UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC.,

Debtors.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

December 19, 2012

10:06 AM

B E F O R E :

HON JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: Three Hundred Eighteenth Omnibus Objection to Claims (Partnership Claims) [ECF No. 28442]

Hearing re: Three Hundred Twenty-Sixth Omnibus Objection to Claims (Severance and Other Employee Claims) [ECF Nos. 29321]

Hearing re: Three Hundred Twenty-Seventh Omnibus Objection to Claims (Partnership and Other Employee Claims) [ECF Nos. 29322]

Hearing re: Three Hundred Sixty-Sixth Omnibus Objection to Claims (Employment-Related Claims) [ECF No. 31989]

Hearing re: One Hundred Forty-Third Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 16856]

Hearing re: Three Hundred Twenty-Third Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 29295]

Hearing re: Three Hundred Seventy-Second Omnibus Objection to Claims (Late-Filed Claims) [ECF No. 31995]

Hearing re: Omnibus Application of (i) Individual members of Official Committee of Unsecured Creditors and (ii)

Indenture Trustees Pursuant to Section 1129(a)(4), or, Alternatively, Sections 503(b)(3)(D) and 503(b)(4) of Bankruptcy Code for Payment of Fees and Reimbursement of Expenses, filed January 30, 2012 [ECF Nos. 24762 and 24881]

Hearing re: Debtors' Ninety-Seventh Omnibus Objection to Claims (Insufficient Documentation) [ECF No. 14492]

Hearing re: Debtors' One Hundred Twenty-Fifth Omnibus Objection to Claims (Insufficient Documentation) [ECF No. 16079]

Hearing re: Debtors' One Hundred Thirty-Eighth Omnibus Objection to Claims (No Liability Derivatives Claims) [ECF No. 16865]

Hearing re: Three Hundred Forty-Sixth Omnibus Objection to Claims (Securities Claims) [ECF No. 30062]

Hearing re: Three Hundred Sixty-First Omnibus Objection to Claims (No Guarantee Claims) [ECF No. 31317]

Hearing re: Three Hundred Sixty-Sixth Omnibus Objection to Claims (Employment-Related Claims) [ECF No. 31989]

Hearing re: Debtors' Objection to Proof of Claim No. 66099 Filed by Syncora Guarantee, Inc. [ECF No. 20087]

Hearing re: Objection to Proofs of Claim Number 14824 and 14826 [ECF No. 30055]

Transcribed by: Nicole Yawn, Melissa Looney

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for Debtors
767 Fifth Avenue
New York, New York 10153

BY: MAURICE HORWITZ, ESQ.
HARVEY MILLER, ESQ.

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Attorney for CF Midas Balanced Growth Fund
1270 Avenue of the Americas
New York, New York 10020

BY: DANIEL F.X. GEOGHAN, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY LLP
Attorney for Official Committee
One Chase Manhattan Plaza
New York, New York 10005-1413

BY: DENNIS F. DUNNE, ESQ.

KIRKLAND & ELLIS LLP
Attorneys for the Dow Corning Corporation
153 East 53rd Street
New York, New York 10022-4611
and
601 Lexington Avenue
New York, New York 10022

BY: PETER TSAO, ESQ.
CRAIG A. BRUENS, ESQ.

OFFICE OF THE UNITED STATES TRUSTEE
Attorney for the Trustee
33 Whitehall Street
21st Floor
New York, New York 10004

BY: SUSAN GOLDEN, ESQ.
TRACY HOPE DAVIS, ESQ.

GODFREY & KAHN, S.C.
Attorney for Creditor, Fee Committee
One East Main Street
Suite 500
Madison, Wisconsin 53701-2719

BY: KATHERINE STADLER, ESQ. (TELEPHONIC)

SULLIVAN & WORCESTER LLP
Attorneys for U.S. Bank National Assoc., as Trustee
One Post Office Square
Boston, Massachusetts 02109

BY: RICHARD HIERSTEINER, ESQ.
JEANNE P. DARCEY, ESQ.

COVINGTON & BURLING LLP
Attorney for Wilmington Trust
620 Eighth Avenue
New York, New York 10018-1405

BY: MICHAEL B. HOPKINS, ESQ.

SHEPPARD MULLIN (UK) LLP and SHEPPARD MULLIN RICHTER & HAMPTON LLP
Attorneys for Bank of New York Mellon
25 Southampton Buildings
London, England WC2A 1AL
and
Four Embarcadero Center
17th Floor
San Francisco, California 94111-4109

BY: RUSSELL L. REID, JR., ESQ.
MICHAEL AHRENS, ESQ.

KLEINBERG, KAPLAN, WOLFF, COHEN
551 Fifth Avenue
New York, New York 10176

BY: MATTHEW J. GOLD, ESQ.

P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

MR. HORWITZ: Good morning, Your Honor. Maurice Horwitz, Weil, Gotshal & Manges, on behalf of Lehman Brothers Holdings, Inc., as plan administrator.

We have four uncontested items on today's agenda. The first is the three hundred and eighteenth omnibus objection to claims. This objection sought to disallow and expunge certain claims for partnership interests that are claims against non-debtor entities.

We're proceeding today with respect to one claimant, Charles Moore, who had filed a response to the objection. Mr. Moore filed a proof of claim against LBHI in the amount of $11 million with two components. One component was for carried interest in a partnership in the amount of approximately $8 million, which is currently subject to omni 318. Another portion of this claim is for bonus compensation in the amount of approximately $2 million. That portion of the claim is currently subject to omni 315.

The claimant has no objection today to the relief requested by the plan administrator to expunge that portion of the claim that relates to carried interest, and, as such, we're proceeding on a consensual basis today with respect to that portion of the claim. The requested relief will have

no effect on the portion of Mr. Moore's claim for bonus compensation.

THE COURT: It's approved on an uncontested basis.

MR. HORWITZ: Thank you, Your Honor.

The next two items on the agenda, omni three twenty-six and three twenty-seven, are also both uncontested. The omni three twenty-six sought to reduce and allow certain claims for severance filed against LBHI. One claimant filed a response. That response has been resolved, and the claimant has agreed to the relief sought by the plan administrator. So we're submitting a consensual order on that omni as well.

THE COURT: That's approved.

MR. HORWITZ: Omni three twenty-seven sought to reduce and allow certain claims for partnership interests. Certain claimants filed responses. Three of those responses have been resolved, and the plan administrator is proceeding on an uncontested basis with respect to those three. The rest are adjourned.

THE COURT: Fine. That's all approved.

MR. HORWITZ: The fourth and last uncontested item on the agenda is omnibus objection three sixty-six. The plan administrator in this omnibus objection sought to disallow the claim of Arthur Kenney (ph), claim 67880, on the grounds that it was duplicative of claim number 14067.

The parties have agreed that one portion of that claim for approximately $65,000 is duplicative and will be expunged today on a consensual basis. About $16,000 -- just over $16,000 of the claim we agree will not be affected by today's order and will remain active and subject to another objection.

THE COURT: Okay. This is approved with that oral modification.

MR. HORWITZ: Okay. Proceeding to the contested portion of the agenda. The first contested matter on today's agenda is the one hundred and forty-third omnibus objection to claims, which sought to disallow certain claims that were filed after the bar date in these cases.

MR. GEOGHAN: Your Honor, excuse me. I apologize. Before we begin, my client was joining us through court call from Europe. I got an email a few minutes ago. There's just a problem with court call and the conference I.D. If we could possibly move this matter over to after the -- there's two contested matters on. If we could possibly be the second, just to give them an extra two or three minutes, see if they can call in, I would appreciate it.

THE COURT: That's fine.

MR. GEOGHAN: Thank you, Your Honor.

MR. HORWITZ: Okay. The second item on the contested portion of the agenda is omnibus -- the three

hundred and twenty-third omnibus objection to claims. This objection also sought to disallow certain claims that were filed after the bar date.

The plan administrator is proceeding today with respect to two claims on omni three twenty-three. Each were filed 30 days after the general bar date in these cases, which was September 22nd, 2009. The claims were filed by the Dow Corning Corporation, one against Lehman Brothers Special Financing in connection with the swap agreements. That is claim number 43840. The other claim was filed against LBHI. It's based on LBHI's guarantee of LBSF's obligations under the same swap. That is claim number 43964.

In its response, Dow Corning argues that its claims should be deemed timely pursuant to rule 9006(b)(1) on the grounds of excusable neglect. As this Court is aware, I have recited the factors many times, but I'll recite them again today.

In Pioneer, the U.S. Supreme Court held that a determination of excusable neglect depends on four factors, prejudice to the debtors, the length of the delay, the reason for the delay, and whether the claimant acted in good faith. The Second Circuit doesn't give equal weight to these four factors. The third factor, the reason for the delay, is the most important and critical factor in

determining whether a claimant has established grounds for finding excusable neglect.

Dow Corning argues that its delay in this case was justified because it was confused regarding the distinction between the LBI SIPA proceeding and these chapter 11 cases. According to Dow Corning, shortly after sending a termination notice to LBSF and a demand for payment in connection with the swap agreement, it received a notice from LBI's SIPA trustee informing it of the liquidation -- commencement of the SIPA proceeding in this court.

It also received a customer claim form, and, on January 22nd, 2009, Dow Corning filed a customer claim in the LBI SIPA proceeding and believed that this was an appropriate way to assert a claim against LBSF and LBHI in their respective chapter 11 cases. Dow Corning further claims that it did not realize it had filed the wrong claim in the wrong case until six days after the bar date in these cases when it received a letter from the SIPA trustee denying its asserted customer claim.

Your Honor, as a preliminary matter, I would point out that, shortly after this Court entered the bar date order in July of 2009, Dow Corning was served with notice of the bar date order. We attached to our reply papers as Exhibit D the corrected affidavit of service of Herbert indicating that Dow Corning was properly served, and Dow

Corning has not disputed this fact.

This was almost six months after Dow Corning filed its customer claim against LBI, and it's roughly eight or nine months after it received notice of the SIPA liquidation. In other words, it's not like Dow Corning had 20 balls thrown at it at once and couldn't tell one from the other. This notice, the notice of the bar date order, came nearly half a year after the first notices and clearly stated that claims against LBHI and LBSF needed to be filed pursuant to its terms and actually received on or before September 22nd, 2009.

Secondly, Your Honor, the Dow Corning Corporation is not an unsophisticated party. The average person on the street may not know the difference between a SIPA liquidation of a broker/dealer in a chapter 11 case. It may not know the difference between a customer claim and a general unsecured claim, but this is a multi-national enterprise and had the means to hire advisers and to conduct the minimal diligence that would have been required in these circumstances to determine, upon receipt of the bar date order and the bar date notice, that its claims needed to be filed in accordance with the bar date order entered in LBSF's and LBHI's chapter 11 cases. It clearly knew the difference between LBSF and LBI, because it was able to send both a termination notice and a demand for payment to LBSF

immediately after LBHI's petition date.

Your Honor, simply put, Dow Corning's failure to follow the clear requirements of the bar date order was a factor that was entirely within its own control, and, in these circumstances, the plan administrator submits that Dow Corning has not demonstrated a reason for the delay that would ground a finding for excusable neglect. Accordingly, the plan administrator requests that the claim be expunged, both claims be expunged as untimely.

THE COURT: Thank you.

I'll hear from Dow Corning.

MR. TSAO: Good morning, Your Honor. Peter Tsao, from Kirkland & Ellis, on behalf of the Dow Corning Corporation.

Your Honor, before I begin, I just want to just note that our declarant, Kathleen Smith, who had -- for who we had filed a declaration attached to our response, was unavailable to attend this hearing today due to a passing in her family. We advised counsel for the plan administrator, and, to the extent Your Honor has any questions for that declarant, we are obviously happy to have her come up at the next omnibus hearing.

THE COURT: I reviewed her declaration, and the content is largely congruent with the statements made in your papers, and I don't have any particular questions of

her.

It's unclear to me, based upon the declaration, that she had actual and personal knowledge of the circumstances surrounding this mistake, and I don't think, unless a showing can be made that she had actual participation in the bad judgment call, that her further testimony will provide a lot of background. It's unclear to me, from your papers and from her declaration, who within the legal department was actually responsible for this matter and how this actually occurred, but this is an opportunity for you to try to explain that, if you know.

MR. TSAO: Your Honor, I think -- to an extent, I think we're in a similar situation in that Ms. Smith, who was our declarant -- it was more of a supervisory role. I actually think the facts in question and the facts provided by Mr. Horwitz just now I don't think, for the most part, we dispute them. I think, at the end of the day, we've read your opinion on late claims that you issued in May of 2010.

We understand that the Second Circuit has a firm stance on bar dates, and, being debtors' counsel in other cases, we completely understand that position, but, looking at the other instances where claimants have moved for a finding of excusable neglect, we think that what distinguishes this instance is that our client, Dow Corning, did act prior to the bar date. As Mr. Horwitz pointed out,

they did receive a SIPA notice and the customer claim.

They filed or entered that information and filed it in a timely manner before the bar date. They mistakenly -- and I -- Your Honor, I can't point to the exact person in Dow Corning, but the legal department --

THE COURT: Is that person still working for Dow Corning?

MR. TSAO: Your Honor, I don't know, but I can tell you that they mistakenly believed that, by filing the SIPA proceeding in the Southern District with the trustee, that that was the equivalent of protecting their rights against LBSF and LBHI in these proceedings.

THE COURT: Forgive my characterization, but it's a clearly bone-headed move on the part of anyone. The circumstances surrounding the Lehman bankruptcy and SIPA cases were at the time and continue to be so notorious that it is very difficult to understand how notices from the SIPA trustee rationally could have been confused with obligations to file proofs of claim as to the chapter 11 cases for LBSF and LBHI, particularly in a setting in which Dow Corning was able to take action almost immediately to terminate the swap and knew the names of the entities that received notice of termination. So this is a hard case for you to win.

MR. TSAO: Your Honor, I think we understand, and we understand the case law clearly on this, and I think

we're looking at the equities of the situation, and, at the end of the day, I think the dispute really -- or the issue really comes down to, you know, the reason for the delay, and, in this instance, you know, our client -- the reason for their inability to file a timely proof of claim was simply a misunderstanding about the SIPA proceeding notice.

I think folks in this courtroom and a lot of folks understand the difference between the SIPA proceeding and the Lehman cases. Unfortunately, however, the legal department at Dow Corning made a mistake. They did what they thought was right at the time, which was file the SIPA. They thought that, by doing that, they were protected and they didn't need to file a separate proof of claim against Lehman and LBHI and LBSF.

In some ways, this is analogous to if they had filed against the wrong debtor. Unfortunately, it's not the wrong debtor. It's a whole different proceeding, but we feel that the equities of the situation lend itself to a potential finding of excusable neglect, and again, this all turns on, you know, our client's mistake in thinking the SIPA filing was the equivalent of filing a claim in these cases.

THE COURT: Okay.

MR. TSAO: Thank you, Your Honor.

THE COURT: I understand the embarrassment of any

claimant in making a mistake such as this, but it's particularly embarrassing for an enterprise such as Dow Corning that is not only a sophisticated, multi-national enterprise, but a former debtor itself. So the intricacies of bankruptcy are not foreign to this enterprise.

This was a mistake, and I won't characterize it any other way, and the reason for this mistake is, frankly, unexplained, or at least not explained to my satisfaction. The declaration does not really provide meaningful detail as to how whoever was responsible for the claims process within the legal department made the error in question. The fact that this is such an unusual circumstance demonstrates that it is not reasonable for this mistake to have been made.

This is the first instance that I'm aware of in which a claim was not filed as to LBSF and LBHI in connection with a derivative by virtue of confusion associated with the claims process in the SIPA case. While it's not evidence, the fact that this is so rare a circumstance tends to support the conclusion that the mistake was not one that's easily explainable, other than through some form of negligence.

For these reasons and largely based upon the reasoning set forth in LBHI's omnibus reply docketed at 32854, I find that the Dow Corning position is unpersuasive, and I find no excuse for the late filed claim, and the

claims are disallowed, both those two, LBSF and LBHI.

MR. TSAO: Thank you, Your Honor.

MR. BRUENS: Your Honor, may we be excused?

THE COURT: Yes.

MR. BRUENS: Thank you.

MR. HORWITZ: Okay. We think that the declarant for the Midas Fund has been able to dial in. So --

THE COURT: Okay.

MR. HORWITZ: -- we will proceed with --

THE COURT: Let's confirm that.

Is there someone on the telephone acting on behalf of CF Midas Balanced Growth Fund?

I don't hear any response.

MR. GEOGHAN: No, Your Honor, I don't, either. I thought I heard the click that they were coming in. There's apparently a problem with the international calling on the conference I.D. number they were provided. They've been trying to get in since about a quarter to 10:00.

THE COURT: Do you want to take a short recess while you try to clarify this, or do you want to proceed in the absence of your declarant?

MR. GEOGHAN: If the Court doesn't have questions for my declarant, I think we could proceed in the absence of the declarant. If the Court believes there will be questions, then I would ask the opportunity to wait a few

minutes.

THE COURT: I don't have any questions for the declarant. I've read the declaration.

MR. GEOGHAN: Thank you, Your Honor. Then, I believe we can proceed.

THE COURT: Let's do that.

MR. HORWITZ: So the next matter is the one hundred and forth-third omnibus objection to claims. This objection sought to disallow certain claims that were filed after the bar date, LBHI's proceeding with respect to the claim of CF Midas Balanced Growth Fund. That is claim 67193.

The Midas Fund's claim is a Lehman Program securities claim. According to the declaration of Nigel Boyland (ph) that was filed in support of the Midas Fund's response, the Midas Fund holds a structured note issued by Lehman Brothers Treasury Co., BV, the Dutch entity that issued structured notes, which Mr. Boyland says was guaranteed by LBHI.

Your Honor, the bar date for claims based on Lehman Program securities, which includes structured notes issued by LBT, was November 2nd, 2009. The Midas Fund filed its claim a full year after the bar date, on November 8th, 2010. In its response, the Midas Fund argues that the Court should allow the claim pursuant to bankruptcy rule

9006(b)(1) on the grounds of excusable neglect.

Your Honor, the plan administrator has reviewed the response filed by the Midas Fund and is unable to discern any action that the Midas Fund took to determine whether its asserted claim against LBHI was subject to the bar date order. From the response, it appears that the Midas Fund relied upon notices that it received from the LBT trustees presiding over the -- or administering the LBT bankruptcy case in the Netherlands.

In fact, the Midas Fund states that the reason for its delay of more than one year is that it relied on these notices, which the Midas Fund claims led it to believe that claims did not need to be filed against LBHI in respect of LBT's structured notes. I would point out, again, Your Honor, that the Midas Fund, while it says very little about itself in its papers, is clearly not an unsophisticated party. It certainly is not a pro se individual, which as many claimants were who filed Lehman Program securities claims. There were approximately 25,000 claims filed against LBHI based on Lehman Program securities, and many, if not most of them, were filed by or on behalf of individuals.

Second, the Midas Fund doesn't attach to its reply or to the accompanying declaration any of the notices that it refers to, and, according to Mr. Boyland's declaration,

the Midas Fund received three notices. The third notice was dated December 22nd, 2008 and stated that beneficial holders of notes issued by LBT are not required to file claims with the bankruptcy trustee, and the bankruptcy trustee aims to coordinate with the LBHI process of filing claims by holders of notes in respect of the LBHI guarantee in the chapter 11 proceedings.

Although a copy of this notice was not attached to the Midas Fund's reply or to the declaration, I have copies of the third notice. I downloaded them from LBT's Web site, lehmanbrotherstreasury.com. I have copies that I can hand to the Court and to counsel for the Midas Funds, if the Court would like to look at them.

THE COURT: Is there any objection to my taking a look at these downloaded notices?

MR. GEOGHAN: None, Your Honor. Copies were provided to counsel. I have copies of all three notices here, if the Court desires.

THE COURT: Okay. I'll take a look at them then. Thank you.

MR. HORWITZ: Your Honor, the last sentence that I just read to the Court is from section 2.5 of the third notice to holders of LBT notes. The very next sentence, after the one that I just read to the Court, says, "More information on the insolvency proceedings of LBHI can be

found on HGTP\chapter11.epiqsystems.com under Lehman Brothers Holdings, Inc. Chapter 11. As far as the bankruptcy trustee is aware, as of the date of this notice, no bar date has been set for the filing of claims in the chapter 11 proceedings of LBHI."

"Noteholders are advised to regularly visit the aforementioned Web site for updated information on LBHI. Since the information that the bankruptcy trustee will provide to noteholders is primarily limited to the bankruptcy of LBT, the bankruptcy trustee will not issue a notice if a bar date for the filing of claims is set in the chapter 11 proceedings of LBHI."

Your Honor, this is the notice that the Midas Fund read and reasonably relied upon or claims to have reasonably relied upon. The language in the third notice clearly indicates that LBHI is subject to a separate chapter 11 case and that the requirements for filing claims against LBHI are distinct from the requirements in the LBT proceeding. The notice clearly warns creditors to monitor the Epiq Web site for information regarding a separate bar date and separate claims filing procedures in respect of guaranteed claims against LBHI.

On October 1st, 2009, the LBT trustees actually issued a fourth notice, which was posted on its Web site. I have copies of that notice as well. Midas Fund does not say

in its reply or in the declaration that it received this notice, but this notice was available on the Internet, and the LBT trustees say that they issued it to all holders of LBT notes. I would like to read from the first page of that notice, and I can hand it up to the Court and to counsel for the Midas Fund, if the Court's willing to hear that portion of the notice.

THE COURT: Do you have any objection?

MR. GEOGHAN: Well, I don't believe so. I'd reserve any right. I have yet to see the document. My client doesn't have a copy of it. Presumably, it was downloaded from the -- presumably, it's not an objectionable document, though.

THE COURT: I think, regardless of what's in your pleadings or what your declarant says he knew at the time, this is relevant to the question of information available at certain points in time to interested holders of near or medium-term notes, and so, I'll consider it for whatever weight it may be entitled to in this argument. It's unclear to me that it's directly relevant, but I'm interested in knowing what was generally out there in the public domain.

MR. GEOGHAN: Thank you, Your Honor.

MR. HORWITZ: And, Your Honor, the fourth notice to creditors states on the very first page, "On July 2nd, 2009, the United States Bankruptcy Court for the Southern

District of New York, having jurisdiction over the chapter 11 cases of Lehman Brothers Holdings, Inc., entered an order establishing November 2nd, 2009 at 5:00 p.m. prevailing Eastern time as the last date and time for each person or entity to file a proof of claim based upon claims arising out of certain securities issued by LBHI or any of their affiliates, including LBT outside of the United States."

Your Honor, in addition to these notices, we cite in our papers the quarterly reports that the LBT trustee issues to holders of LBT structured notes, specifically the third public report in which the LBT trustee goes so far as to -- never to explain the difference between the claims filing requirements of LBT's Dutch bankruptcy proceeding and LBHI's chapter 11 case. In addition to all of the foregoing, as we state in our papers, notice of the securities program bar date was published in 10 languages in 26 newspapers across 18 countries. I could list them, but I'll spare the Court that litany.

The program securities bar date notice was also provided to Euroclear, Clear Stream, and similar clearing systems as well as to the issuers of Lehman Program securities, including LBT, with instructions to distribute the notice to the holders of Lehman Program securities. Your Honor, given, not only the widespread publication of the program securities bar date notice, but also the

repeated admonitions from the LBT trustees to their holders, the plan administrator submits that the Midas Fund has conducted -- has not conducted even a minimal amount of diligence that it would have been required such that it could have understood the difference between the two proceedings and the application of the bar date order to its asserted claim against LBHI. As such, the plan administrator submits that the Midas Fund has not made a sufficient showing for finding of excusable neglect and that its claim should be expunged.

THE COURT: Okay. Thank you.

MR. GEOGHAN: Good morning, Your Honor. Daniel Geoghan, Young Conaway Stargatt & Taylor, here for CF Midas. Thank you for taking the time this morning, Your Honor.

Your Honor, there is -- as much as I was going to start with a long discussion of the background of how we got here on the excusable -- with regard to the excusable neglect issue, I think there's one pressing issue before we get there. This claim was allowed. This claim was allowed by the debtor. On August 26th, 2011 -- and a copy of the notice was provided to the Court in supplemental response, this claim was allowed by the debtor.

THE COURT: Well, I saw your supplemental response, and I understand that's your argument. I think you're going to need to connect the dots on that argument,

because I think that there's a distinction to be drawn between a notice and an objection to the claim based upon late filing. If you want to argue waiver on the basis of a notice, you can certainly make that argument, but you're going to have to connect the dots in order to prevail on that argument, because I'm not very sympathetic to it.

MR. GEOGHAN: Well, Your Honor, I think there are some dots that can be connected, including section 502(j) of the bankruptcy code, which provides that, once a claim is allowed, it can -- that allowance can't be overturned without cause, and that language, that section does not provide that an order is required. That language simply provides that once a claim is allowed.

The debtor clearly, by its own admission, has allowed this claim, and I would differentiate, if I may, from a claim that is listed in schedules as contingent, unliquidated, or disputed, which could subsequently be amended. I would differentiate that, because here, we had an actual allowance of the claim subsequent to the initiation of a contested matter by the debtor, and I do think that that is a distinguishing factor here, and again, referring the Court to 502(j). It does not require an order saying that the claim was allowed. It simply requires that the claim be allowed.

Excuse me one second. And I think that is very

important, not only in the equitable sense in that my client's claim was allowed by an admission by the debtor and not a simple admission by a notice provided to us that doesn't say anything about reserving the right to come back and challenge us again. Moreover, in an equitable and an estoppel sense, my client can rely on that notice that their claim is now allowed.

So I think that that fact differentiates my client and the late-filed claim from other late-filed claims, which is an important part of the process here, because it also differentiates my client from the floodgates argument that allowing this claim would have some tremendous effect on the estate. This claim has already been reserved for. This claim has already been accounted for.

It's been allowed. It's calculated, I'd imagine, into the distribution. Now, obviously, those are the words of counsel. There would need to be some form -- I mean, if we were going to go farther down that road as to whether or not this claim was actually calculated into the distribution calculation, obviously, we'd have to take some kind of discovery, but that's -- this is an initial hearing and not an evidentiary hearing, and I appreciate that, Your Honor.

In addition to the 502(j) argument, Your Honor, obviously, I would want to make a record on the issues of excusable neglect. As was stated in the papers, Your Honor,

my client received, through its corporate representative, numerous notices, and clearly, there was a misunderstanding among people as to what was going on with the notices. It's not clear that a copy of the bar date order was sent to my client. I didn't see their name on any affidavit, but, as counsel pointed out, there was publication. There are other methods.

Also, I would point out, as to the fourth notice, which we do not have a copy of, no evidence was presented that my client -- that a copy of that was given to my client, delivered, actual or constructively to my client. So I don't know if anybody was aware of it, but certainly, in October 2009, my client, through its representatives, was taking steps to gather information related to its Lehman claims, and it sought, through its representative.

This Bank of New York Mellon was the custody in assets for CF Midas. So there would have likely been notification to Bank of New York Mellon more than CF Midas, and CF Midas would have communicated back to Bank of New York Mellon directing them what to do, and so forth, and Bank of New York Mellon would have taken action, and my client sought to provide information to Bank of New York Mellon, and, not knowing it needed to provide information to Lehman, Bank of New York Mellon -- excuse me -- informed it that it had provided insufficient information or there was a

problem with the information.

My client responded and said well, what information could we need for a U.S. bankruptcy we hold Dutch assets, and no response was given, and there fell the problem, and, when my client realized they had a problem, they had mistakenly not filed the claim, they immediately took action to file that claim.

Your Honor, I think, importantly here, is again, the fact that this claim is allowed, and why is that important? Your Honor, there is no prejudice to the debtor or the creditors. This claim has been allowed.

There is no prejudice with regard to distributions. The amount of the claim has already been calculated in and reserved for, I would imagine. There's no interference with the claims review and reconciliation process. The claim has been allowed.

I believe that CF Midas would take the position that the length of delay is not dispositive of the issues here, because the claim has been allowed. So, Your Honor, I would say that there's been no suggestion that CF Midas acted in bad faith at any time, so I don't believe that that is an issue, and, as I stated earlier, the reason for the delay -- CF Midas had received numerous notices. It was confused about what expectations people that -- what it may have had to file, if anything.

It believed it was dealing with a Dutch entity. It was not aware that it had to file something in a chapter 11 case in the U.S., and it believed, because it was continuing to receive those notices, even after this October 2009 issue, that whatever was going on was still in progress and that it wasn't an issue it needed to address, and that, I believe, stands for why that there is excusable neglect here for a late-filed claim, if the Court believes that that's where we need to -- that we need to consider that, but again, I would come back to the fact that this is an allowed claim, and 502(j) does not require that there have been an order entered. This claim was allowed by the debtors already. Thank you, Your Honor.

THE COURT: Does the debtor have a response?

MR. HORWITZ: Your Honor, I actually have to apologize. I should have raised this initially so that the Court could have had this in mind before listening to counsel for Midas Fund's argument that the claim has been allowed.

The order that approved the structured securities valuation methodology process, the process of sending out notices to creditors and resolving any disputes states on page five -- I have a copy of this as well, which I can hand up, if the Court wants to look at that --

THE COURT: I'd like to see it.

MR. HORWITZ: -- as I read from it.

THE COURT: Okay.

MR. HORWITZ: If the Court will turn to page five in the center, third -- ordered -- paragraph down, ordered that, "Notwithstanding anything herein, the debtors reserve the right to object to the structured securities claims at any time, including after such claims have been allowed for the purposes of voting and distributions under the plan on the grounds that such claims do not include a blocking number, include invalid blocking number, are duplicative of other claims, have been amended or superseded, or otherwise do not comply with the provisions of the bar date order."

Your Honor, LBHI needed this language in this order because it had not at the time that these methodologies and these procedures were being negotiated and approved -- it had not had the time to review all 1,700 late claims that had been filed in these cases and couldn't be sure that, when sending valuation notices, that it wouldn't be sending them to claims that have all kinds of procedural defects, and so, it needed to reserve its right to object to them on those grounds, and the plan administrator submits that those rights were properly reserved and that any objection to the Midas Fund claim on the grounds that it was filed after the bar date has not been waived.

THE COURT: It's true, however, that the notice

that went out to CF Midas Balanced Growth Fund and presumably to other holders of structured securities claims did not include a specific reference to a reservation of rights to object to the amount of the claim that was set forth in that notice, to which -- do you want to verify that?

MR. HORWITZ: Yeah.

THE COURT: Because I took a look at that notice in the supplement filed by CF Midas, which is ECF No. 21186, and the notice is an attachment to that document, and the argument made in the supplement is that there was, in effect, allowance by notice without reserve.

MR. HORWITZ: Well, as to the reserve, Your Honor, the plan administrator's reserving for all disputed claims, as required by the plan in the amount filed or agreed to with the parties or otherwise ordered by the Court. There's no question about that. They certainly are doing, actually, in excess of those amounts, to be conservative. So a reserve is established for all disputed claims, because that's what's required by the plan.

The notice that was sent to claimants and which is attached to the Midas Fund's reply does reference the order that was entered, approving the procedures for sending these notices and only says that the determination of the amount of the portion of this claim is allowed -- or this is the

allowed amount solely for purposes of voting and distribution. I'm sorry. Not distributions. Oh, I'm sorry. It says that the order provides for procedures for the determination of allowed amounts for portions of -- for the amount of portions or portions of claims based on structured securities. So it doesn't actually say that the claim is allowed. It's merely proposing an amount that creditors had the opportunity to object to.

THE COURT: Well, it's obviously in the claimant's interest to be characterizing this as a method for allowing a claim, and I've already expressed my skepticism with regard to that, but we do need at least to gather the documents in order to determine if this aspect of the argument has merit.

MR. HORWITZ: Well, Your Honor, the only other part of the Midas Fund's argument that I could see having any relevance is the estoppel argument, because the debtors intentionally included this language in the order to preserve their rights to maintain objections. Even if they sent these notices, and it's not clear to me what damage the Midas Fund's incurred by relying on this notice if the plan administrator's objection was never withdrawn and distributions had never been made, all indicating -- especially distributions not being made in the past two distributions, indicating that the plan administrator

continues to treat this claim as a disputed claim.

The plan administrator also contacted counsel for the Midas Funds months ago to schedule this contested hearing. Every aspect of the plan administrator's behavior has been consistent with the treatment of this claim as a disputed claim, as that term is defined under the plan.

So it's not clear -- beyond the receipt of this notice, it's not clear what actions the Midas Fund may have taken in reliance on receipt of that notice that in any way damages its position now. It's in the same position it would have been in if we had had this hearing the very day -- the day before it received this valuation notice.

THE COURT: Okay.

Anything more?

MR. HORWITZ: I just -- I'm sorry?

THE COURT: Anything more?

MR. HORWITZ: I just point out that the argument that the Midas Fund received numerous notices only suggests that the greater likelihood that the fund did actually receive the fourth notice at least, which provided clear notice of the bar date, but, even if the Midas Fund had just read the third notice that it admits it received, it would have had at least the tools necessary for a sophisticated party to do the reasonable diligence to determine whether or not the bar date order applied to its claims.

As for the prejudice argument, Your Honor, we've discussed this before many times and in colloquy in these hearings. The plan administrator does not object -- is not objecting to late claims as a penny-saving exercise. It is an exercise undertaken with the goal of treating all creditors fairly and equally.

So, while the amount of the claim may not completely throw off the distributions in these cases, the point is, as I said, 25,000 Lehman Program securities claims were filed in these cases. One thousand, seven hundred and fifty claims were filed after the bar date. Only 70 of those claims remain unresolved in one way or another.

For the rest of them, claimants have either had their claims expunged, or they have voluntarily withdrawn their claims, or the plan administrator has reached some kind of a resolution that it's comfortable with in terms of meeting its fiduciary duties to its creditors. The prejudice here, as I've said before, is to all creditors in these cases who either had their claims expunged because they didn't comply with the bar date or took the steps necessary to comply. That's all I have.

THE COURT: Okay.

Is there anything more?

MR. GEOGHAN: Just two brief points, Your Honor. Again, Daniel Geoghan, Young Conaway.

Your Honor, first with regard to the point made that, in August 2011, there was some 1,700 late-filed claims, and they were -- and Lehman was not in a position to go through all of them. Your Honor, in August 2011, we were in active conversation with Weil -- excuse me, with Lehman's counsel with regard to these claims. Our response had been filed in July. This did not -- this was not us sitting by the wayside and this notice showing up.

There was an active conversation, and, when it showed up, we said, "Hey, wait a second. You've allowed the claim now. Your objection is moot."

In regard to the notice, Your Honor aptly pointed out that, one, it contains no reservation, and, two, it does state that the claim is being allowed for voting and distribution purposes. I don't think it could be any more unambiguous.

While I appreciate that there is a reservation in the order, as pointed out by counsel, the reservation in the order to object to claims at a later time for allowed claims on other grounds, I'm not convinced of, necessarily, its validity. If I include a reservation in a proof of claim stating I reserve the right to amend this claim and I change the amount some place farther down the road, they still have -- Lehman will still have the right to come back and object to my amended claim as being untimely.

I think that 502(j), as I said, Your Honor, is quite clear, and it does not require an order, and I have gone back to the case law, and I have not found -- and possibly, someone else will, but I have not found a case that states an order is required under 502(j) for a claim to be allowed, and I believe that that's --

THE COURT: But a timely proof of claim is required for a claim to be allowed, or the claim has to be scheduled. Neither is the case here. So how do you obtain allowance by ambush, which is what you're really seeking to argue?

MR. GEOGHAN: Well, I disagree wholeheartedly, Your Honor. I don't believe this is allowance by ambush. Aside from the fact that there have been numerous conversations about this and email exchanges, it is --

THE COURT: Well, but here's the issue, at least as I see it. In a more perfect world of drafting notices and preserving all rights and defenses at the same time, the notice would have included a conspicuous reservation of rights. It did not.

The question really is whether that matters. You're suggesting that this is a gotcha moment in which an inconsistent position is taken, and, as a result, you're able to say, "Aha, we have an allowed claim because of the notice."

I seriously question that, particularly in a setting in which the order dealing with determining the amounts for voting purposes with respect to structured securities claims represented one of those major, difficult, unprecedented issues being addressed in the run-up to the confirmation hearing, and, from an administrative perspective, I'm sure looking back on this, debtor's counsel would wish that you're not in the position to make this argument, but the question is whether the argument ultimately has legal merit, and that's where you're going to need to address.

MR. GEOGHAN: Your Honor, and if I may just add that I believe it does, obviously, have legal merit. Again, we --

THE COURT: Well, it's a legal argument. Whether or not it's --

MR. GEOGHAN: It's an argument.

THE COURT: Whether or not it's an argument that leads you into the promised land of an allowed claim is another question.

MR. GEOGHAN: Your Honor, as I stated there, we were in conversation in the middle of this whole experience between the claims objections, and they knew that the claim objection was in place, and then, they allowed the claim. Moreover, we went back to them immediately and said, "You've

allowed our claim. We believe your objection is moot."

Arguably, at any time thereafter, they could have renewed their objection, put on a new objection. They could have taken some steps to preserve rights. If that order -- if that notice is determined to act as an allowed claim as of that date, arguably, they're beyond the statute of limitations in 90024 to even seek at this point by cause to reconsider the claim, and, Your Honor, if I may point the Court to in re Tender Loving Care Health Services, Inc.

It's a Second Circuit case. The cite is 562 F.3d 158. It's not squarely on point, I'll admit, but it does discuss the concept of a contested claim dispute that is resolved with an allowed claim. In that case, it was resolved by an agreement of the parties, a stipulated claim, that then later a trustee came back to seek to object to, because the trustee realized the claim was miscalculated, and the Court, the Second Circuit held in that case that it was beyond the statute of limitations.

It's not on point, but I don't think it's that far off point, either, Your Honor. There, it's a contested matter. Here, there was an allowed claim, and now, 16 months later, after there have been numerous discussions and I begged them to put this on in September and October, begged them. I filed a motion asking them to put this on, and they refused. It's now coming back up and becoming an

issue.

Thank you, Your Honor, and I'm not sure what Your Honor will do. I am guessing maybe we require more briefing at this time, but I await the Court's direction.

THE COURT: Well, one of the things I'd like to focus on -- and I think the pleadings as filed may require some supplementation -- is the true impact on the claim of CF Midas Balanced Growth Fund of the notice that we've been discussing and the application, if any, of 502(j), which, read literally, does not appear to directly apply to this situation, since the language reads, quote, "A claim that has been allowed or disallowed may be reconsidered for cause."

That's just the first sentence, but reconsideration speaks in terms of a deliberative process, not an accidental one, and it is truly unclear to me as I consider the argument that 502(j) applies at all, and it's also unclear to me as a matter of the equities of the case a phrase that appears also in 502(j), that it is in any respect equitable for the debtor's position with respect to a late-filed claim to be waived by virtue of a notice that was issued on the strength of an order that included an express reservation of rights, and so, I would be interested in some relatively concise follow-up submissions by each of the claimant and the debtor on a schedule that the two of

you can agree to.

This being the holidays, I'm not going to impose an immediate schedule on this, but let's see if we can have those submissions in anticipation of a hearing to take place either in January or February of next year and deal with this question. While that's pending, I'll reserve any further comments with regard to the fundamental question of excusable neglect, and we'll deal with that after addressing this other question.

MR. GEOGHAN: Thank you, Your Honor.

THE COURT: Okay.

Now, we have Renata Thomas' claim.

MR. HORWITZ: Yes, Your Honor. This is the last contested item on the agenda. This is the debtor's three hundred and seventy-second omnibus objection to claims also seeking to disallow claims filed after the bar date. Ms. Thomas filed her claim on December 7th, 2012 and was the sole claimant responding to this objection. I don't know if she's present in the courtroom or on the phone today.

THE COURT: Is Renata Thomas on the telephone?

I believe she resides in the U.K.

MR. HORWITZ: I think that's correct.

THE COURT: Is Renata Thomas in the courtroom?

The answer to both questions is negative, so let's proceed in her absence.

MR. HORWITZ: Your Honor, the response filed by Ms. Thomas is -- and actually, it tells a very sad story. She tells us that, at the -- she says that, at some time -- it's not clear exactly what time she was dealing with numerous personal and family matters that were out of her control. She was suffering from depression. Her aunt passed away.

She was separated from her partner of ten years. Her nephew passed away. She didn't know what steps she had to take to file a claim. She doesn't have any legal background. She does appear to have several degrees, but not law degrees.

Actually, Your Honor, in other circumstances, this is the type of response that the plan administrator might ordinarily consider not proceeding with the objection, because the plan administrator has withdrawn objections to claims that were filed after the bar date when claimants say they were dealing with a death in the family or taking care of, you know, a loved one who was sick or hospitalized themselves, but those are usually claims that were filed at least within a year after the bar date.

This is an instance where we believe that the length of the delay really is the critical factor. Claimants continue to file claims in these cases. We receive claims even today. I mean, just this month and last

month, even though the confirmation order provides that even timely claims cannot be amended any more without a court order, this will interfere with the administration of the cases if people can continue to file late claims up until the closing of the case, even if they were -- even if the circumstances at the time that the bar date order was delivered to them would otherwise have constituted excusable neglect. For this reason, the plan administrator must --

THE COURT: When was this claim filed?

MR. HORWITZ: December 7th, 2012.

THE COURT: Just a week or so ago?

MR. HORWITZ: Right, right.

THE COURT: How did it happen that something that was filed only this month ended up on the docket as a contested matter this quickly? Do we have the dates right?

MR. HORWITZ: Oh, I'm sorry. I'm looking at the -- you know what? It's not filed in December. It was -- I'm looking at the response date, but I believe it was filed in March.

THE COURT: In March of this year?

MR. HORWITZ: Right.

THE COURT: All right.

MR. HORWITZ: But there have been -- there are claims that were filed this month and last month. I mean, this is an ongoing problem that we have, and we put -- we

object to the claims as late so that they are expunged from the register.

THE COURT: Well, I've read the response of Renata Thomas, and it's heartfelt and personal. It recites a series of personal distractions in her life during the period immediately following the filing of the Lehman bankruptcy case. She appears to have been an employee who did not make a particularly large salary in her work.

It seems that the letter does not include a specific rendition of the excuses that might apply to a late-filed claim, especially one that's as late as this. While the response is a plea for mercy, in effect, it does not provide any cause for excusable neglect of this order, and so, I grant the objection as to the claim of Renata Thomas and find that her response is unavailing.

MR. HORWITZ: Thank you, Your Honor. That concludes the items on today's agenda.

THE COURT: All right.

We have a calendar today at 2:00. So we're adjourned until 2:00.

MR. HORWITZ: Okay.

THE COURT: Thank you.

(Recess at 1:04 p.m.)

THE COURT: Be seated please. Good afternoon. Mr. Dunne.

MR. DUNNE: Good afternoon, Your Honor. Dennis Dunne from Milbank Tweed on behalf of the committee.

I guess that introduction may be worth repeating. Milbank is appearing here today on behalf of the committee of unsecured creditors and no one else.

THE COURT: I understand that from your papers.

MR. DUNNE: We have two matters before the Court today, Your Honor. Both relate to the requests by members of the committee for payment of the fees and expenses of their respective legal counsel.

One is the substantive legal question which we need Your Honor to decide whether Section 1129(a)(4) authorizes the payment of these fees.

The other is the question that the U.S. Trustee raised recently about whether Milbank should be heard on this matter and so, Your Honor, we're happy to deal with these issues in any order that pleases the Court and unless Your Honor has a preference, I'll take the disqualification aspect first.

THE COURT: My preference is that you do just that.

MR. DUNNE: Your Honor, contrary to the United States Trustee's allegations, we represent only the committee. For the past four plus years, we have represented no one else in these cases. I recognize they

wish that weren't the case for purpose of their argument, but that is the truth. We do not represent the individual committee members. The members each have their own counsel who I believe are present here today.

We are here for one reason and one reason only is that Section 6.7 of the plan, as confirmed last year, provides for the payment of these fees. The committee was involved in the negotiation and documentation of all agreements embodied in the plan, including this one.

The committee exists post the occurrence of the effective date for purposes of implementation of the plan, pending litigation, payment of professional fees.

The U.S. Trustee's challenge substantively is a direct assault on one of the provisions of the plan, Section 6.7, a section that was voted on by the creditors and received no challenge from any other creditor or economic stakeholder.

We're here on behalf of the committee to defend that plan provision as it was negotiated, as it was written and as it was voted upon.

Similarly, to the extent the Court has any comments or concerns about the individual applications with respect to reasonableness or otherwise, counsel for the individual committee members will respond to them as appropriate.

A couple of other points, Your Honor. We believe, and we've said this before, because we've appeared a number of times in front of Your Honor on this issue, either at hearings or in chambers conference, that it actually promotes the policy and the purpose of efficiency to have us argue the one global plan issue whether Section 1129(a)(4) authorizes the payments contemplated in Section 6.7 of the plan.

It is somewhat surprising that we are here today on this issue. We haven't concealed our role, Your Honor. It's been open, it's been notorious. We have appeared at hearings. We've appeared at chambers conferences with Your Honor starting, I think as early as last February. We have consistently addressed the Court and the parties on this issue and we've been the sole mouthpiece regarding the interpretation and implementation of Section 6.7 of the plan and the limits of Section 1129(a)(4) of the Code.

We expect to argue that point today. Everything else that is specific or unique to a particular applicant's request will be handled by respective counsel for that applicant and not by us.

And, Your Honor, I really have nothing further to say on this point.

THE COURT: Okay. Thank you.

MS. GOLDEN: Good afternoon, Your Honor.

Susan Golden for the United States Trustee. With me here today is the United States Trustee --

MS. DAVIS: Tracy Hope Davis.

MS. GOLDEN: Your Honor, our papers set forth our reasons for the objection. However, in light of Milbank's response, obviously we were waiting until we came to this hearing to respond and Mr. Dunne's presentation just a few moments ago. I do want add a few additional points in response, which shouldn't take too long.

I think that there seems to be a little bit of confusion over which version of Section 6.7 of the plan was actually the confirmed section.

The plan provision that is relied upon, excuse me, by the applicants and Milbank is not the provision which was ultimately confirmed in the plan and referenced in the confirmation order.

When the third amended plan was filed in September of 2011, Section 6.7 did provide for the direct payment of the counsel fees to the individual committee members' attorneys. The U.S. Trustee filed her objection to the plan in early November, 2011 and these payments were among the U.S. Trustee's objections.

After much negotiation, and realizing that, for the most part, that this historic plan was heading toward a consensual solution and resolution, no one, least of all the

U.S. Trustee, wanted to stand in the way of confirmation on this particular issue and have it litigated then.

So, after much negotiation, the plan was amended and revised and the revised Section 6.7, which was ultimately confirmed in the plan, provided that the applicants could be paid only upon application and approval by the Bankruptcy Court.

The confirmation order which controls any inconsistency over the plan went further. And, in paragraph 74, it provides that nothing in the plan or confirmation order shall affect any party's rights to object or defend any application and that all applications -- all -- excuse me. Paragraph 74 provides that nothing in the plan or confirmation order shall affect any party's rights to object or defend any application and that all objections, including the appropriate legal standard, and any objection as to whether these payments are authorized under the Code and Rules at all were expressly reserved.

Now even though all of the committee members filed applications, this is not a committee issue since it really has nothing to do with representing the unsecured creditor body as a whole; the body that Milbank was retained to represent and for whom Milbank owes their fiduciary duty.

Here, despite what Mr. Dunne is saying, Milbank is advocating for the committee members as a group and not for

the committee representing the unsecured creditors.

It is not proper for counsel, who has a duty to the entire unsecured body, to advocate for a ruling which, if granted, would harm their constituency -- which, if granted, would harm their constituency by pulling $26 million out of the estate.

Milbank, as committee counsel, is taking a position detrimental to the unsecured creditor body as a whole. Milbank should be looking to reduce fees coming out of the estate and not increase them.

Now, if Milbank put in a statement as committee counsel, and said, if the Court finds in favor of the applicants, the committee thinks the fees are reasonable, that's one thing. But to advocate for this, the U.S. Trustee believes is a conflict and a totally different scenario.

All of the applicants here, even though they were committee members, or are committee members, are interested parties. And the only benefit that will accrue will be solely to the individual members.

Milbank also made an argument in their response to our motion that because at one of the chambers conferences, debtor's counsel which had not yet taken a look at the applicants' applications, reviewed the fees, the committee didn't have to do so as well because that's duplicative.

I mean, if this is true, then perhaps the fee committee should have objected to the committee review of all sorts of documents throughout the case. Obviously, that cannot be what Milbank was intending as the general rule. Because if it is, then committee counsel fees in all cases would certainly be a lot smaller than they are now, if they didn't have to duplicate what the debtor was doing.

Finally, as Mr. Dunne just argued, Milbank argues that it is more efficient for them to argue the standard that the Court should apply to these applications because it is a global issue. The U.S. Trustee does not expect the Court, should you rule in her favor, to listen to nine or ten different attorneys argue the same legal standard before you.

But she does expect that it is appropriate for one of the applicant's attorneys to make that argument, not committee counsel who has a conflict of interest.

And, in terms of the -- Milbank's role as the open and notorious and representing the committee all along in this case, for this particular issue, I will say that we do have a disagreement about that. And for quite some period of time our discussions with Milbank were premised on the idea that -- that they were really acting more as liaisons or intermediaries in connection with the negotiations between the U.S. Trustee, I guess the debtors to a lesser

degree, and the individual applicants because there were so many other attorneys.

So I just wanted to set that out and unless Your Honor has any questions, I'll sit down.

THE COURT: Before you sit down --

MS. GOLDEN: Sure.

THE COURT: -- I have a few questions. What is the remedy that you seek today to insure that Mr. Dunne is unable to speak on behalf of the committee with respect to this issue? Or to make sure that he is unable to speak on behalf of individual committee members on this issue? Or that because of the ambiguity surrounding that question that he is simply unable to speak?

MS. GOLDEN: The U.S. Trustee does not take the position that Mr. Dunne is unable to speak on behalf of the committee. As I said, certainly the committee can weigh in as to whether or not the committee believes that the fees are reasonable. Should the Court rule that the applications would be granted.

THE COURT: That's not what we're dealing with today. We're dealing as a threshold matter --

MS. GOLDEN: Okay.

THE COURT: -- with the standard applicable to these applications and Mr. Dunne, both in his oral statements this afternoon and in his papers, has said that

he's here to speak with respect to the enforceability and applicability of Section 6.7. Most particularly, the 1129(a)(4) aspect of that plan provision.

In what respect to you object to that role for him?

MS. GOLDEN: It does not appear that Mr. Dunne is, in fact, representing the committee as a committee. Mr. Dunne advocating and making the global argument appears to be committee counsel advocating for the individual members of the committee, all of whom have filed these applications and it appears to be a conflict and the U.S. Trustee believes it is a conflict.

THE COURT: And in what respect does the U.S. Trustee seek a remedy with respect to that conflict and how is that remedy to be applied for purposes of today's hearing, if I were to agree with you.

MS. GOLDEN: If you don't agree with me or you --

THE COURT: What are you looking for?

MS. GOLDEN: -- do agree -- if you were to agree with me, the U.S. Trustee believes that one of the individual applicant's counsel should be arguing and taking the lead role in the global issue of the 1129 versus 503 threshold legal issue.

THE COURT: Well, I'm not going to prevent Mr. Dunne from representing the committee and he can say

whatever he wants to say. And he's already done that very effectively in writing and is prepared to do that this afternoon.

Are you saying that what you are looking to have me do is to, in effect, impose a gag order on Mr. Dunne and others from his firm and to the extent that anyone is going to be speaking to the general legal issue in question, we're going to have to take some kind of break in the action and have somebody appointed from among the various applicants who will be the common advocate for their cause. Is that what you're asking for?

MS. GOLDEN: We are asking that one of the applicant's attorneys do the primary argument on behalf of their cause.

We have no objection for Mr. Dunne speaking on behalf of the committee as a committee. But the way the argument is structured, Mr. Dunne and his firm, not Mr. Dunne, personally, is conflicted. And the other remedy, should you agree with the U.S. Trustee, would be that Milbank's fees, to the degree that he is representing the individual committee members, rather than the committee as a whole, should not be paid from the estate.

THE COURT: One of the problems I'm having here is that your perception of a conflict is being inflated with the proof that a conflict actually exists and that's a

disputed issue of both fact and law. It is disputed vigorously by Milbank. What evidence, if any, exists to suggest that Mr. Dunne and his firm are acting on behalf of individual committee members for purposes of today's hearing as opposed to acting as counsel for the committee, something which he has steadfastly asserted is the only thing that he is doing. Is there any evidence here or is this just some concern that you have about appearances and the appearances are what drive you?

MS. GOLDEN: No, the appearances are not what drives -- what drives the U.S. Trustee. What drives the U.S. Trustee is that committee counsel has a fiduciary duty to the entire unsecured creditor body. The creditors' committee also has a role in reviewing fees.

On the one hand, the committee has a role in looking at the fee applications from the individual committee members as part of their duty.

Mr. Dunne is also advocating that the fees, in essence, should be paid. He is not arguing before the Court that the fees shouldn't be paid. He is arguing for the standard under which the fees should be paid. And it is our view that committee counsel is on both sides of the issue. And that is a direct conflict.

THE COURT: Okay. I understand your position. Does anybody else wish to be heard --

MS. GOLDEN: Thank you.

THE COURT: -- on this? I'm going to permit Milbank to act as it has acted throughout these cases as counsel for the committee and I'm going to leave it to Mr. Dunne and his partners and his firm to conclude whether the conduct of today's hearing is or is not conduct on behalf of his actual client, the committee, or conduct which is on behalf of members of the committee.

He has asserted that he is acting on behalf of the committee and I accept that. I also expect the professionalism of Mr. Dunne and his firm and believe that he is doing what he is doing consistent with his conclusion that he is acting in a professional manner on behalf of his sole client, the creditors' committee.

I leave it to his arguments to speak for themselves. But I've read the papers and understand generally what his firm's position is with respect to these issues and we'll get to the merits.

To the extent there is an objection by the U.S. Trustee to a conflict of interest, I overrule that objection.

(Pause)

MR. DUNNE: Thank you, Your Honor. Before I turn into the merits, a couple of housekeeping notes relating to today.

I believe we do have representatives for each of the eight applicants, either in the courtroom or available today. Those eight are comprised of seven current members plus there was one former member of the creditors' committee.

This application was filed nearly a year ago on January 30th, 2012. At numerous points over the past year, we continued the hearing date in order to allow opportunities for discussions, negotiations and potentially amicable resolutions to play themselves out. As a result of some of those discussions with Your Honor at prior hearings and conferences, as well as with the debtors, we've supplemented the record.

We supplemented the record with three declarations. One from Noel Purcell, who's in the courtroom today, of Mizuho (ph), who is one of the co-chairs of the committee, another from Julie Becker, also who's present in the courtroom today, of Wilmington Trust, again a co-chair of the committee, and one from John Sukow (ph) who is present (indiscernible - 00:18:16).

These declarations set out, one, the history of the plan provision in question. How did Section 6.7 come to be in the plan? It also sets out the enormous workload that the committee faced and undertook and lastly it sets forth the debtor's view that the requested fees are reasonable

under the circumstances of this extraordinary case.

We were advised, prior to the hearing, that the U.S. Trustee's office was not going to cross-exam any of the declarants. And accordingly I would move as a housekeeping matter for admission of those declarations.

THE COURT: Is there any objection to admitting the declarations?

MS. GOLDEN: No, Your Honor.

THE COURT: Okay. They're admitted.

MR. DUNNE: Thank you, Your Honor. Despite our constant willingness to enter into a good faith dialogue to resolve any questions or concerns, the parties were unable to resolve all issues, but we've narrowed them.

One the dust settled from aborted settlement discussions with the U.S. Trustee's office, and from our efforts to respond to questions and comments of the debtors, we stand here today with one legal issue that I'm going to address and one legal issue, I believe, for the Court to adjudicate which is does Section 503(b) of the Bankruptcy Code leave no space for the payment of fees approved under Section 1129(a)(4) of the Bankruptcy Code?

And let me just quickly set out the three relevant statutes. Section 1123(b)(6) provides what a debtor may place in a plan. It provides maximum flexibility for the debtor to include any "appropriate provision" in a plan so

long as it is not inconsistent with other sections of the Bankruptcy Code.

Section 1129(a)(4) provides that any payment to be made by the debtor, under or in connection with the plan, be subject to Court approval as reasonable.

And Section 6.7 does -- of the plan does so provide for the payment and the reimbursement of the fees and expenses of the members of the creditors' committee and it's subject to your Court's finding that they are reasonable.

We would not have any issue but for Section 503(b) which governs the request for payment of fees by parties who have rendered a substantial contribution to the case. We believe our reading of these statutes, as I'll explain in a moment, is consistent with Judge Gerber's ruling and reasoning in Adelphia and is consistent with basic principles of statutory construction as set forth in numerous Supreme Court cases.

Our reading harmonizes and breathes life into each of the sections. On the other hand, the U.S. Trustee's desiccated reading would render Section 1129(a)(4) a nullity with respect to settling parties' fees.

In a nutshell, Your Honor, here is the difference between Section 1129(a)(4) and 503(b) of the Bankruptcy Code. The latter gives a party the right, subject to

complying with the requirements of Section 503(b), to be paid its fees even if every other party in the case opposes the payment. So long as the Court finds that the elements of Section 503(b) are satisfied, the estate must pay.

In other words, it is a mechanism for saddling the estate with certain obligations it may not want to pay. It provides, in essence, a mechanism for the non-consensual payment of certain fees granted only when those fees and the corresponding efforts of the applicants have been shown to clear the high bar of Section 503(b).

Conversely, Section 1129(a)(4)provides a framework for the payment of certain amounts in the context of the confirmed plan of reorganization.

Given the Congressional purpose of Chapter 11 plans, this all makes eminent sense. Congress desired to provide a framework for resolution of disputes and a framework for consensus in Chapter 11. The public policy favoring settlements over litigation is a strong one. In that context, using Section 1129(a)(4) to provide an avenue for the payment of reasonable attorneys' fees for those parties that have facilitated, fostered or brokered peace clearly furthers that Congressional goal.

In other words, Section 1129(a)(4) is a path for the payment of reasonable fees that has the consent of the creditors pursuant to a confirmed plan. It is very, very

different than Section 503(b).

THE COURT: Can I break in and ask a question about some of the implications of this policy? And this question, or this series of questions that this will prompt, does not reflect on the statutory interpretation argument that you're making.

But I do have some questions and concerns about what happens to 503(b) and its role in providing for opportunities for compensation for committee members and for others who provide a substantial contribution in a setting in which parties to plan negotiations become highly motivated to do a work-around by means of 1129(a)(4) and, in effect, provide for, and don't get me wrong when I use this term, payoffs to committee members in the plan negotiations in which everybody's getting something.

And one of the concerns I have here is optical. We have an extraordinary, once in a generation, maybe once in a century insolvency event which has resulted in an uncommonly successful consensual plan. And we're dealing with numbers that we have also become mutes too but that are truly mind boggling in their scale.

We're dealing with hundreds of billions of dollars. And we do it all the time in this case. That means that a fee request for committee members that in the aggregate is just north of $25 million begins to appear

relatively small by comparison.

The circumstances that led to Section 6.7 could be viewed as both during a consensual plan, the committee did a tremendous job in helping to produce that good result but they certainly weren't the only party-in-interest to claim some credit here and in the context of all this money, why should any committee member be out-of-pocket considering all they did for the good of the case?

Now, I'm simply paraphrasing what may be a perception that a third party looking at this might have. I'[m not saying that that dialogue ever took place because I don't know what dialogue took place.

But here's the concern. To the extent that this becomes standard operating procedure in large Chapter 11 cases, and when we get to plan phase, the well represented committee members say, you'd better put in a provision that provides for us to get paid, and it's put in under 1129(a)(4) so that we avoid the 503(b) requirements, and we end up with a system in which a lot of lubrication is being applied to committee members that may or may not be a good thing. That's my policy concern. How do you address that?

MR. DUNNE: Your Honor, I address it because I think that you also answered it in your statements that this is a sui generis case here in Lehman. This is a case where the committee members themselves were called upon to,

frankly, just do more work than I've ever seen a committee member have to do between the committees and the subcommittees that they were on.

And Your Honor knows that thousands of hours drilling deeply into some of the most complex financial instruments that humans have ever devised. And they did that at a time when for years they were the only sounding board for the debtors in terms of a proxy or surrogate for the creditor groups at large who were not restricted, did not seek non-public information and, I think a testament to their efforts is that when we finally did go public and a number of the ad hoc groups got restricted in June of 2011, in two weeks we had a plan done with minor changes to it because what we had done with the debtors in that collaborative effort, proved to be a flashpoint for kind of rapid consensus.

Every party in this case recognizing the efforts that it takes to kind of be comfortable that we're doing the allocations of value and the claims assessment correctly has been compensated or reimbursed for their respective legal counsel. There's only one group remaining and we're standing here -- it's the committee members' fees that haven't been paid. The ad hoc committees and the others have.

And I believe that Your Honor can craft a ruling

that is unique to the extraordinary facts and circumstances of Lehman because what I care about today is the reality of the application of 1129(a)(4) in the Lehman case on the backdrop of what each of -- what I know each of the committee members did in terms of their individual efforts. And the need for counsel in this case that might not exist in other cases.

THE COURT: Understood. The objection of the U.S. Trustee notes that the committee, as a committee, had access to a number of professionals, your firm, other law firms, (indiscernible 00:30:24), FTI and one of the questions that a third party could reasonably ask is why should any individual member of the committee have significant out-of-pocket expenses in respect to its role on the committee at a time when the estate is already paying hundreds of millions of dollars to pay for professionals who are doing the work for the committee?

So I'm not asking you necessarily, in your capacity as committee counsel to be responsive to that question, but understand that from my perspective, I have that question.

MR. DUNNE: Right.

THE COURT: And somebody's going to have to answer it. I also, and I'm going to be upfront about this right now, I cannot understand how any individual creditor can

legitimately assert a right to payment with respect to in-house counsel and whoever has asserted such a claim is going to have to speak to that, but not at this moment. Sometime before this hearing comes to a conclusion.

But part of the concern that the objections and the various responses raise, but frankly that the declarations do little to answer is why individual members of the creditors' committee would have fees and expenses of $26 million? I don't understand even in the largest case in the universe why individual committee members would have such expenses unless such expenses were incurred to deal with their individual interest about which I know nothing and about which you really aren't in a position to comment.

MR. DUNNE: Correct. But let me make one comment on that, that, Your Honor, which I think will be helpful because I represented a number of official creditors' committees over the course of my career and very often they are a few to no counsel for individual committee members.

Lehman was truly exceptional in this regard and it goes without saying, it was exceptional given the size and complexity of it, but I want to put a finer point on it.

What I believe a lot of the roles were for the individual counsels was in connection with the plan, and the whole process of getting ready for the plan, at the end of the day when we were getting prepared to engage the debtors

with what we thought would clear the various creditor groups, in terms of acceptable allocations of value among LBHI, LBSF, LCPI and the like, we, the committee's advisors, would present a proposal to the committee which the committee members would then debate it amongst themselves.

And the assistance of counsel in that process was critical given what we were talking about here. It was the nature of Lehman's business that was not particularly familiar to any one of the committee members.

So there was time in the cases where it was actually important for us to use the committee members and the fact that the members held different position -- they were -- it was put together by the U.S. Trustee's office for exactly this purpose. There was people with claims at OBHI. There were people that held claims at LBSF. And when we called balls and strikes as best we could, it was helpful to take a moment, step back, reflect on and hear what the individual members thought through the prism of where they were at the particular time.

To kind of stress test whether we -- you know, people are all kind of marginally all unhappy with this and think they could do better. That's probably the right place to land which I think was ultimately proved out when we rolled it out to the ad hocs. But that was something I frankly haven't encountered to the same degree, nearly the

same degree in any other case before, which I think explains a little bit of what Your Honor was asking as to why did they need individual counsel that we -- you know, where you have committee counsel.

So -- but beyond that in terms of precisely what they did, I'll leave for other people to address.

THE COURT: Okay.

MR. DUNNE: Your Honor, there is one factual point that I do want to underscore and Ms. Golden mentioned it before which is that the creditors did overwhelmingly vote to accept the plan with Section 6.7 in there. No creditor, no economic stakeholder objected to Section 6.7 or to the payment of the fees to the legal advisors for the committee members.

I submit that fact proves the consensual nature of the payment and is the predicate, the underlying predicate for payment under Section 1129(a)(4) subject to a finding of reasonableness and that the analysis should end there.

The U.S. Trustee's reservation of rights to Section 6.7, which includes their right to object to the fees and the propriety of using Section 1129(a)(4) was added on the eve of confirmation and was effectuated through the confirmation order and not the plan itself. And I raise that for the obvious point that there was -- what was actually in the solicitation package when creditors voted

was 6.7 without the reservation of rights.

So you can't draw the conclusion that creditors voting on the plan saw the reservation of rights and said, I don't have to be bothered with that. People all reserve their rights. What they saw was just a statement that these fees will be paid after the effective date.

There is one case on point, Your Honor, we should talk about. Judge Gerber's ruling in the Adelphia case which found that Section 503(b) does not occupy the field completely and that Section 1129(a)(4) provides an independent basis for payment of attorneys' fees. He recognized that the hurdle for payment of fees under Section 503(b) was different, was higher than that under Section 1129(a)(4) which simply requires the fees to be reasonable.

He concluded that the different standards were appropriate and reflected the difference between forced payments by the debtors or of the debtors under Section 503(b) and consensual payments pursuant to a creditor and court-approved reorganization plan.

He found that a provision in a plan for the payment of fees was appropriate under Section 1123(b)(6) for inclusion among the "nearly infinite types of provisions that can go into a Chapter 11 plan, pursuant to which the debtors may distribute and allocate the value of their estates by broad array of means." 441 B.R. at page 14.

The same is true here and we urge the Court to adopt Judge Gerber's rationale.

The U.S. Trustee attempts to distinguish Adelphia on several grounds. They focus on the amount of litigation in Adelphia and the need there, the pressing need for a settlement. Here, it is true that we avoided the litigation but frankly I think that is more reason to approve the fees not less.

As I said before, the committee spent years, in essence, acting as the various creditors' surrogate in discussions with the debtors. The plan that we negotiated with the debtors reflected that work. The fact that the creditors in -- which was amazing to me then as it is now, took all of two plus weeks to get onboard with the plan for Lehman is a testament, I think, to the quality of the work undertaken by the committee and its members, who spent years reviewing non-public information, analyzing reams of data relating to Lehman's assets and liabilities, and digesting various legal analyses.

Had we not succeeded, this case would be mired in the fever swamp of litigation and inter-estate squabbling. Indeed, had litigation erupted, all of the fees in the case, including those of the applicants today, would have been several orders of magnitude higher by the time, some point in the future, when that litigation had run its course.

The committee members, Your Honor, I submit, in this case, on these facts and these circumstances should be rewarded for a job well done and not penalized. They should be commended for perfectly playing the role of creditor proxy because it is as a result of those efforts that we had the flashpoint for success in June of 2011.

The U.S. Trustee also argues that Adelphia should be limited to the world of ad hoc committees and not official committees. There's little basis to so limit Judge Gerber's reasoning in the case on that basis. He concluded, with respect to ad hoc committees, that Section 503(b) did not apply because 1129(a)(4) governed the consensual payments of fees provided for under confirmed reorganization plan. The same should be true here.

One last comment, Your Honor, and I'll cede the podium.

Given the fees paid to date in this case, and the Section 503(b) awards given to the various attorneys and financial advisors for the numerous ad hob committees, I'm somewhat surprised that the U.S. Trustee's office chose to fight this fight.

The case has been incredibly successful. Compromise and consensus has been its hallmarks. I was hoping that they would continue to be the hallmark through today.

The U.S. Trustee is right that we are not an ad hoc committee but an official committee. But as I was preparing for this hearing, I kept reflecting on the fact that yes, it is an official committee, and it is because the Office of the U.S. Trustee selected these very seven or eight institutions from a cohort of hundreds of creditors willing to serve. It was the U.S. Trustee who instructed them of their fiduciary duties to all unsecured creditors.

She reminded them that they needed to do right by all those creditors and could not be guided by what might provide the best return on their individual claims. She told them they would be restricted from trading while on the committee. She warned them to expect a substantial burden of work to flow from the review of Lehman structure and assets and liabilities.

As we've heard time and again, Lehman's Chapter 11 case was and is the largest and most complex case to ever file and the burdens on the committee members were similarly unparalleled. The committee members took their jobs extremely earnestly. They rolled up their sleeves and dove deeply into some of the most complex financial instruments that I've ever seen.

The sheer magnitude of the claims and the counter party agreements was daunting but they plowed ahead. They required additional assistance in discharging the duties the

U.S. Trustee's office set out for them at the beginning of the case.

Having performed those duties, in my view, faithfully and selflessly, I'm somewhat confounded that it is the U.S. Trustee's office and only the U.S. Trustee's office who now says that they should alone among the constituents, all of whom have had their lawyers' fees paid and not have their legal expenses reimbursed for their extraordinary efforts.

She has turned a bit on her own creation, Your Honor, and I just want to conclude that putting aside the law for a second, I believe it's inequitable not to grant the applicants' request in light of the facts of Lehman and the work done by each of the committee members in this particular case.

Thank you, Your Honor.

THE COURT: Thank you. Before you sit down, I have a question and it's not clear to me whether it's a question or if it's a question both for you and the U.S. Trustee to respond to and it's not so much about the merits of your argument and the passion with which you've expressed it. I still have this image of myself in a fevered swamp.

(Laughter)

THE COURT: But --

MR. DUNNE: That's where we'd all be, Your Honor,

I share --

THE COURT: And it's frankly a frightening -- it's a frightening image.

But I am reminded of a somewhat similar issue in this case that arose a few months ago involving 503(b) applications of certain financial advisors to ad hoc committees in this case.

And there was a settlement reached and the settlement was not fully put on the record but it became the basis for what turned out to be a consensual hearing in which I ended up making some unscripted remarks about 503(b) and its application to entities that were neither attorneys nor accountants.

And it was apparent to me that as I was making those remarks counsel for the U.S. Trustee appeared slightly uncomfortable that I might say some things that would create a record when, in fact, the goal of the settlement was to avoid just that, to avoid a ruling that would have potentially meaningful precedential impact.

And one of the things that concerns me a great deal about this afternoon's argument is that we find ourselves having a singular event in this case for the first and only contested hearing with respect to the allowance of professional fees, something that I believe could have been avoided and should have been avoided by parties who are

acting truly in good faith, with a view toward reaching a constructive resolution.

One of the things I would like to know without going into the specifics of the discussions is whether it remains possible for the parties involved in this dispute to reach a resolution that would allow individual members of the creditors' committee to receive reasonable compensation and we could discuss what that means at some appropriate time while avoiding a binding determination as to whether that compensation is being paid pursuant to 1129(a)(4) or 503(b), in effect finessing the legal argument we're now having.

So my question is do you believe as someone who has participated in this process for now almost a year that peace no longer has a chance?

MR. DUNNE: It's a good question. I never want to say that peace no longer has a chance but, Your Honor, picked up -- when I had my concluding remarks, I also was thinking about the 503(b) settlement with respect to the financial advisors and there was a strong statutory argument there that they should not be compensated and people resolved it without any precedential effect. And, frankly, Your Honor, we had this hearing teed up for November 29th and there was -- it was adjourned because we were going to meet on November 30th. I was hoping that that's precisely

the dialogue that we would have had on the 30th that -- I can't speak for the individual members, but having spoke to them before the 29th, that I don't any of them are in it to have a ruling necessarily as to how they're getting paid, that it has to be under 1129(a)(4) and it has to be pursuant to 6.7.

If there was a settlement that allowed their reasonable fees to be paid and we did it in a way such that it had no precedential value, they can correct me if I'm wrong, but I'm assuming that that would be acceptable to them because that was the premise under which we adjourned the November 29th hearing date to -- in advance of settlement discussions on the 30th.

Now I think the question is more appropriately addressed to the office of the United States Trustee because I think the answer from that side is no, that there is no hope for peace. But from our side, yes, there would be along the lines you were saying.

THE COURT: Well, this doesn't need to become a public airing of several positions but I do want to know whether or not there is any prospect that if we were to take an adjournment here for some period of time, the parties might be able to reach some sort of understanding. And, frankly, I am deeply troubled that it has gotten to this point and I consider this to be a particularly distasteful

dispute; one that, in my view, should never have been brought. It reflects poorly on the U.S. Trustee's office. And I'm saying that publically and on the record.

I think we should take an adjournment even for 15 minutes so that people can talk to each other. I'm doing that on my own.

MR. DUNNE: Thank you, Your Honor.

(Recess)

(Court Resumes)

THE COURT: Be seated please.

(Pause)

THE COURT: Anything happen on the break?

MS. GOLDEN: No, Your Honor, the U.S. Trustee would like to proceed.

THE COURT: Go right ahead.

MS. GOLDEN: Thank you, sir.

(Pause)

MS. GOLDEN: Your Honor, the U.S. Trustee objects to the applications to the individual committee members for the following reasons and I will give the U.S. Trustee's reasons and then go into a little more detail in my presentation.

The approval of the payment of the fees requested by these applicants are expressly prohibited by Section 503(b)(4) of the Bankruptcy Code, which was amended in 2005

to specifically address the issue of the compensation being sought today.

Section 1129(a)(4) does not provide any independent basis for the Court's approval of the fees and the Adelphia decision on which the applicants' rely expressly rejected the contention forwarded by the applicants that Section 1129(a)(4) provides a stand-alone and independent basis for the approval of these fees and the applicants have not really argued any other Code provision which governs their applications.

But even if the Court believes that Adelphia does apply to this case, the applicants have not met the standards that Adelphia used under 1123(b)(6) because it could never be appropriate to award fees which are inconsistent and specifically prohibited by the Bankruptcy Code.

Even for sake of argument, if the express provisions of Section 503(b)(4) did not prohibit the payment sought, the initial declarations in the original applications and the declarations in the reply that was filed lay out that the committee members did exactly what they were charged to do.

The U.S. Trustee does not dispute that the committee -- that the applicants worked extraordinarily hard in this case as did everyone.

THE COURT: Is this an example of no good deed going unpunished?

MS. GOLDEN: No, it's an example that, unfortunately, for the applicants the Code prohibits the payments that they are requesting.

THE COURT: But that's absolutely not true. 1129(a)(4) does provide an independent basis for it and a fair reading of the Adelphia case would permit these payments to be made right now, if I chose to.

MS. GOLDEN: No, Your Honor, even Judge Gerber in the Adelphia case, said that 1129(a)(4) is not an independent operative basis --

THE COURT: What if I said that? What if I were to say, right now, and then write an opinion consistent with it, that it provides an independent basis for it? That everybody voted for a consensual plan in the largest bankruptcy in history and that these committee members who provided extraordinary service and there's no dispute as to that, are entitled to their payments. The only question being what's reasonable.

Let's just say, for the sake of discussion, that I did that. Your argument’s gone. So to argue Adelphia doesn't necessarily solve anything since I believe there well could be an independent basis and the committee's papers support that.

MS. GOLDEN: Well, the U.S. Trustee --

THE COURT: Another reason why I don't understand, why your office is deciding to make this the issue that you've made it? You don't have to answer that. I'm simply shocked. Deal with it.

MS. GOLDEN: I understand, Your Honor.

(Pause)

MS. GOLDEN: Your Honor, in the applicants' declarations, the applicants candidly admit that the fees that they are seeking to have reimbursed were incurred for their own private benefit and not for the interests of the creditors or the estate as a whole and that they had to rely on private counsel because strategic interests diverged from those as creditors as the whole, and that they couldn't rely for certain things on creditor committee counsel.

While the applicants were certainly entitled to protect their interests by seeking separate representation, there is no justification for shifting the cost to the creditors generally whose interests were admittedly not aligned on those matters.

As I said, Your Honor, the declarations and even the presentation and argument of Mr. Dunne make clear how hard the applicants worked in this case. But the applicants were sophisticated creditors that were put on a diverse committee. And they volunteered to sit on that committee.

And they had the benefit of excellent law firms, including Milbank, and two financial advisors, Houlihan and FTI.

The committee professionals to date have been paid over $315 million in total. Milbank received approximately $140 million. And, as Your Honor noted, the amount of support and advice that was retained by the creditors' committee was certainly commensurate with the type of case that this is, or was.

But I think it needs to be noted that the final fee application of Milbank lists 401 separate attorneys that worked on the Lehman case.

THE COURT: What does that have to do with what's before the Court today?

MS. GOLDEN: What that has to do with is that the committee members were adequately represented by committee counsel, who were their advisors, and that their -- excuse me, their declarations do not offer any evidence that they performed services independent of their roles as fiduciaries sitting on the committee.

(Pause)

THE COURT: Is it your position, regardless of the legal standard that applies here, that there is no case in which individual committee members, who are appointed to an official creditors' committee can establish entitlement to the recovery of their own professional fees? Is that your

position?

MS. GOLDEN: That is our position.

THE COURT: And what's the basis for that?

MS. GOLDEN: That in 2005, Congress amended the statute 50 -- excuse me, 503(b)(3) and (4) to specifically exclude the legal and accounting professionals of sitting committee members.

THE COURT: That assumes that that's the exclusive means for committee members to obtain payment and that assumes the correctness of your legal argument that 1129(a)(4) does not provide a sound, independent basis for asserting a right to such payment, particularly when the plan itself that was voted on included Section 6.7, that included specific reference to such payments.

All of that assumes law on that in evidence. It assumes the correctness of your argument, correct?

MS. GOLDEN: That is correct.

THE COURT: So it's simply an assertion of your office.

MS. GOLDEN: Well, of course, it's an assertion of our office.

THE COURT: Not based upon any governing precedent.

MS. GOLDEN: Based on the statute, based on --

THE COURT: Well, the statute --

MS. GOLDEN: -- the Bankruptcy Code.

THE COURT: -- the statute has not always been the model of clarity which is the reason we have so many cases interpreting it.

MS. GOLDEN: The Bankruptcy Code explicitly prohibits these payments and Section 1129(a)(4) does not give an independent stand-alone basis on which payments which were explicitly prohibited by another section of the Code can be paid. And that is the position of the U.S. Trustee.

THE COURT: I understand that's your position.

(Pause)

THE COURT: It doesn't mean it's correct. Nor does it mean that I would rule in your favor.

(Pause)

THE COURT: But please proceed with your argument.

MS. GOLDEN: Thank you, Your Honor.

The Bankruptcy Code deliberately sets a very steep standard for creditors who wish to be reimbursed for their pre-confirmation legal fees out of the estate.

Under Section 503(b)(3) and (4), those creditors must show that they performed one of several specified actions for the benefit of the estate or which resulted in a substantial contribution to the case. It must also show that their legal fees were necessary and reasonable.

In the case of creditors who serve on a committee, that steep standard becomes a prohibition. Section 503(b)(3)(f), excuse me, is the exclusive co-provision for the payment of the actual and necessary expenses of individual committee members.

The expenses are generally held to be travel, meals, lodging and the like, incident to their service on the committee. Section 503(b)(4) expressly excludes by its terms the compensation of attorneys or accountants for an entity whose expenses are reimbursable under Section 503(b)(f).

It is noteworthy that Section 503(b)(4), which prior to 2005 appeared to allow the payments being sought here was amended by Congress to expressly carve out committee member legal fees from the types of expenses that can be recovered no matter how beneficial or necessary they were.

In fact, in the First Merchant case, which is a 3rd Circuit case, 198 F.3d 394, the court in allowing these fees prior to 2005 was clearly troubled by the result in allowing them. But, based on the statute, did and wrote in dicta that perhaps Congress should reconsider. And in 2005, the Code was amended and did just that.

The applicants have argued that Section 503 does not govern their applications. However, they do not explain

what role, if any, Section 503 does play regarding their applications and whether there are circumstances that make these applications exempt from the Section 503 prohibitions that apply to the very payments that they seek.

As Mr. Dunne pointed out, and as the papers imply, they argue that because the payments are consensual, Section 503(b)(4) prohibitions do not apply. However, there is nothing written in the Code which substantiates this claim. There is no consent or complex case or Lehman exception in the Code.

The plain language of the text of 503 applies to all payments made by the estate for administrative expenses. It does not distinguish between consensual and non-consensual payments.

(Pause)

MS. GOLDEN: Instead, Your Honor, the applicants argue that 1129(a)(4) governs their application. However, 1129(a)(4) does not provide, as I said before, any stand-alone, independent basis for the approval of the applications and the applicants have not cited other statutory provisions pursuant to which their application can be granted.

Section 1129(a)(4) is a general statute which provides that the Court exercise substantive control over the fees and costs related to a Chapter 11 case and the

payments should be disclosed and approved as reasonable. Nowhere does it --

THE COURT: Why doesn't that provision you just read apply direction to the payments that are part of these applications?

MS. GOLDEN: No, Your Honor. Excuse me, I'll let you finish. I'm sorry.

THE COURT: I'm challenging you --

MS. GOLDEN: I know.

THE COURT: I'm challenging your assertion. Why doesn't what you just read specifically provide that in a plan with my approval as to reasonableness I can approve any fees to anybody in connection with the plan.

MS. GOLDEN: Because 1129 does not purport to authorize payments that are otherwise prohibited -- prohibited, excuse me.

THE COURT: Well, what you're saying is that --

MS. GOLDEN: A payment cannot be approved --

THE COURT: What you're saying is they're otherwise prohibited as substantial contributions, but that doesn't mean that they're otherwise prohibited.

MS. GOLDEN: No. These are otherwise prohibited by a --

THE COURT: Why are they -- but you see, you're conflating substantial contribution with permissible

payments. You're suggesting that substantial contribution is the only way that payments can be approved and that's not what the law says. And that's also not what Adelphia (ph) says.

MS. GOLDEN: Well, let me address your first -- your first comment. These payments are expressly prohibited by 503(b)(4).

THE COURT: What do you mean by these payments?

MS. GOLDEN: The payment sought by the individual --

THE COURT: The payments provided by Section 6.7 of the plan we have to talk about that section.

MS. GOLDEN: Sure.

THE COURT: We can't talk about substantial contribution as if that is what governs because that's your argument. We have to talk about what the plan says --

MS. GOLDEN: Uh-huh.

THE COURT: -- and what my powers are consistent with applicable bankruptcy law including 1129(a)(4).

MS. GOLDEN: Uh-huh.

THE COURT: So deal with that.

MS. GOLDEN: Okay. Section 6.7 was amended. Section 6.7 expressly took out the direct payment provision. The provision of the confirmation order specifically accepted all objections and left them on the table regarding

not only the payments themselves but whether they were able to be made and also what statutory standard would govern if any.

THE COURT: But Ms. Golden, you've put the (indiscernible - 1:02:58) of your oral argument.

The reason that the confirmation order was changed with respect to 6.7 was to deal with your objection to that aspect of the plan.

MS. GOLDEN: That is correct.

THE COURT: And so you reserved the right to argue for a year after the plan was confirmed that those (indiscernible - 1:03:21) weren't permissible under Section 503(b). You're making that argument now.

MS. GOLDEN: Correct.

THE COURT: But that doesn't mean that at the time that everybody voted on this plan that was (indiscernible - 1:03:36) applauded as a magnificent achievement, that they didn't fully recognize that these payments were contemplated.

MS. GOLDEN: Your Honor --

THE COURT: In fact, there is no evidence that there is any person who voted on the plan that didn't fully expect these payments to be made. And there is no economic stakeholder that's taking any position here contrary to making those payments.

And you are standing here on behalf of your client as a matter (indiscernible - 1:04:00), correct?

MS. GOLDEN: I am standing --

THE COURT: Because you have a certain reading of the code and you're here to enforce it, but that doesn't mean it's the right reading.

MS. GOLDEN: That is Your Honor's jurisdiction, but that is correct. We are here to enforce what we believe the code allows or does not allow.

THE COURT: But what about what a plan can provide for?

MS. GOLDEN: Your Honor --

THE COURT: Is it your position that a plan cannot permissibly provide for the payment of certain expenses of official committee members?

MS. GOLDEN: Yes.

THE COURT: Why?

MS. GOLDEN: Because it is not authorized by the bankruptcy code, because it is prohibited under Section 503(b)(4).

THE COURT: So your position as a matter of law is that Section 503(b)(4) and provisions related to it trump the ability of the parties to a consensual plan to provide for payments to committee members or to others who might qualify for substantial contribution claims in a case?

MS. GOLDEN: The Bankruptcy Code prevails regardless of whether people consent.

THE COURT: Excuse me?

MS. GOLDEN: The Bankruptcy Code on this particular provision in connection with committee -- individual committee members fees and expenses -- attorney fees and expenses, not incidental fees and expenses -- prohibit the payments and it is the position of the U.S. Trustee that they cannot be consented to in a plan.

THE COURT: But let's just take your next question at face value.

MS. GOLDEN: Sure.

THE COURT: Prohibits the plan. Prohibits the payment in the context of their substantial contribution claim. But what makes this a substantial contribution claim?

MS. GOLDEN: This is not a substantial contribution claim. They're seeking to have their independent attorneys be paid. They have not provided evidence that they made a substantial contribution, first of all.

THE COURT: Do they have to? Do they have to if Section 6.7 of the plan provides that the payments can be made?

You're conflating -- in my view -- Section 6.7

with substantial contribution and I'd like you to more precisely parse out your argument if you can.

MS. GOLDEN: Sure. Section 6.7 was amended and it was carved out by the confirmation order with the discussion argument and ruling by the Court to be deferred.

Under the Bankruptcy Code in Section 503(b)(4), the payments being sought by these applicants for their individual attorneys are prohibited.

THE COURT: I don't -- you'll have to explain what you mean by prohibited?

MS. GOLDEN: I think that it's -- I think that the text of the Bankruptcy Code is very clear.

THE COURT: Well, I -- here's where -- here's where -- here's where you need to help me --

MS. GOLDEN: Sure.

THE COURT: -- because I'm drawing a distinction in my mind --

MS. GOLDEN: Uh-huh.

THE COURT: -- between consensual activities that are set forth in a plan the (indiscernible - 1:07:35) and that become in effect the contract that ultimately becomes effective on confirmation. And statutory provisions that would govern a claim by a third party for a right to payment for having made a substantial contribution in a case.

And so what I'm trying to understand and you just

have to help me through it --

MS. GOLDEN: Sure.

THE COURT: -- is how anything with respect to 503(b) prohibits parties from engaging in consensual behavior to contract and (indiscernible - 1:08:27) terms of a plan.

Now presumably, you might argue at some point in the future that a plan that attempted to do that could not be confirmed because it violated provisions of the Bankruptcy Code. But we didn't do that here.

What we did instead was delay to another day --

MS. GOLDEN: Uh-huh.

THE COURT: -- arguments as to these rights to payment. But that doesn't really change the fact that the rights to payment are being asserted pursuant to the different code section.

And you keep insisting that that code section doesn't apply and I'm disagreeing with you. So your job now is to convince me that you're right and you haven't done that yet. So I'm giving you another chance to do it.

MS. GOLDEN: Your Honor, it is the U.S. Trustee's position that parties cannot consent to violate the Bankruptcy Code.

THE COURT: But why is it a violation of the Bankruptcy Code to provide for payments that are otherwise

permissible under 1129(a)(4)?

MS. GOLDEN: Because there's nothing in 1129(a)(4) that would override Section 503(b).

THE COURT: That's what you say.

MS. GOLDEN: Correct. And that's what the Supreme Court says in the --

THE COURT: And what makes -- and what makes you right in saying that? What makes you right in saying that there's nothing that permits an override of 503(b) in a plan which provides for payments pursuant to 1129(a)(4)?

MS. GOLDEN: Because Section 29 -- excuse me -- 1129(a)(4) is a broad general statute. And when the rules of statutory construction sent down by the Supreme Court state that when there is a broad section and a conflicting specific section, it is the specific section that overrides the general section.

THE COURT: That's true, except 503(b) doesn't deal with the contents of a plan.

MS. GOLDEN: No. But it does deal directly with the payments that are being urged for the Court to approve today.

THE COURT: That's the extent of your argument?

MS. GOLDEN: That's the extent of my argument.

THE COURT: Okay.

MS. GOLDEN: May I continue, Your Honor?

THE COURT: Sure.

MS. GOLDEN: Thank you.

Your Honor, 1129 does not provide any stand-alone independent basis for the approval of these fees. And as I just said it is a general statute, which provides only that the Court exercise control over the fees and costs related to Chapter 11 cases. And as I stated, it does not purport to authorize payments that are otherwise prohibited.

Your Honor, the applicants also -- to bolster their argument -- rely on Judge Gerber's Adelphia (ph) decision, which they state is directly on point. And I will be clear that the U.S. Trustee, not surprisingly, believes that the Adelphia decision was not decided correctly.

The U.S. Trustee objected to the payments in Adelphia and the position of the U.S. Trustee continues to be that those types of payments approved in Adelphia and the payments being sought here are prohibited.

The U.S. trustee also believes that the applicants have misread Adelphia. There is a distinction between ad hoc committee members whose applications are not specifically proscribed by the Bankruptcy Code and individual creditors' committee members whose are. But most importantly, in Adelphia, Judge Gerber expressly rejected the contention put forward by the applicants that 1129(a)(4) provides a stand-alone independent basis for the approval of

fees.

Judge Gerber stated unequivocally -- and I quote, Section 1129(a)(4) is still no more than a requirement or a condition. It does not provide for an affirmative grant of authority. It does not give permission to do anything. And that's the Adelphia Case 441 B.R. 13.

In Adelphia, the Court stated that the provision for the payments to the creditors' professionals were actually authorized by Section 1123(b)(3)(a) and (b)(6). And Judge Gerber stated, on its face, 1123 permits a provision of this character, except to the extent that the appropriate requirement demands judicial scrutiny as to a provision's propriety for reasons other than inconsistency with the Bankruptcy Code. Adelphia at 15.

Adelphia did not address 503(b), pro or con with respect to the Court's belief that the payment to the creditors' attorneys in connection with the settlement is allowable.

Here, as I stated, the applicants invoke 1129(a)(4) in an area where 503(b) expressly prohibits the payment.

Your Honor mentioned substantial contribution. And for the sake of argument only, even if the express provisions of 503(b)(4) did not in the U.S. Trustee's view, prohibit the payments sought, the applicant's own

declarations established that they performed the functions of the members of a creditors committee. They served on sub-committees. They had numerous meetings. They handled negotiations. Everything the committee members are charged to do as fiduciaries and seemed to fall squarely within the 503(b)(4) exclusion.

As I said at the outset, the U.S. Trustee is more than aware how complex and challenging and historic this case was for everyone involved. But there is no evidence submitted that the applicants provided a substantial independent benefit to the estate separate and apart from their roles as committee members.

Even if already not excluded in their declarations and in the reply, the applicants candidly admit that the fees they are seeking to have reimbursed were incurred for their own private benefit and not for the interests of creditors or the estate as a whole.

In paragraphs 29 to 34 of the reply, the applicants assert that they had to rely on private counsel because at times their strategic interests diverged from those of creditors as a whole and they could not rely on committee counsel.

And as I also said at the outset, the applicants were certainly entitled to protect their interest by seeking separate representation, but there is no justification

presented for shifting that burden and that cost to the estates.

THE COURT: Well, let me just break in and --

MS. GOLDEN: Sure.

THE COURT: -- remind you of something that Mr. Dunne said during his argument.

MS. GOLDEN: Sure.

THE COURT: And I'd like you to react to it.

My recollection is that he said that one of the unique features of this remarkable case is that when it was time to bring parties together and come up with a plan that ultimately would be tested by voting and the plan approval process. That was facilitated greatly by the fact that committee composition allowed committee counsel to interact with what amounted to a beta test of different constituencies in the case a whole.

And that outside professionals to these individual committee members greatly advanced the process of committee deliberation because given the sophistication of the issues, both legal and factual, no individual committee member could perform the services of a committee member without independent advice.

That being so, it seems to me a case could be made for substantial contribution in this instance.

MS. GOLDEN: That's -- that's - -

THE COURT: Do you agree -- do you agree or disagree?

MS. GOLDEN: Are you asking whether I agree that the independent -- the individual committee members could separately sort of freelance have an -- bad word -- but could separately -- separate and apart from their role as committee members file an application for substantial contribution, independent of their role as committee members? Is that your question?

THE COURT: No.

MS. GOLDEN: Okay.

THE COURT: I was actually asking a much more general question.

MS. GOLDEN: Okay.

THE COURT: I was simply asking in light of your comment that you believe that the applications here if judged on a substantial contribution standard would not fly because everybody was acting in their capacity as a committee member.

I gave you the hypothetical of Mr. Dunne's argument that these individual committee members were also, while on the committee, dealing with their individual needs through outside professionals and in so doing provided resources that benefitted the committee as a whole and also provided resources that benefitted the case as a whole.

(Pause)

MS. GOLDEN: Those professionals if they were benefitting the committee either should be borne by the individual committee members or should have been retained by the estate or the committee. Excuse me.

If those individual counsels were doing work that committee counsel could not advise on, then perhaps they should have also been retained by the committee or their expense should have been borne by the individual committee members.

THE COURT: I'm very surprised to hear you say that, because my understanding of what went on here is that certain individual committee members at various points in time recognized that there were issues that were arising in the bankruptcy case that required consultation with their own counsel. Because there were particular economic interests that affected them, not the committee as a whole.

But what I hears Mr. Dunne say was that that process benefitted the entire plan process by giving the committee access to informed members who were able to be representative of the different points of view within the entire constituency of unsecured creditors.

That's not a situation that involves retention of further estate professionals. That's --

MS. GOLDEN: No, no, no, I misunderstood your --

THE COURT: That's purely --

MS. GOLDEN: I misunderstood your question, Your Honor.

THE COURT: -- an example of private services that provide indirect, but substantial benefit.

MS. GOLDEN: I -- I misheard your question, Your Honor, and it has always been the U.S. Trustee's position in this case that it is up to Your Honor to make the determination as to whether a substantial contribution has been made.

THE COURT: I understand, but does the fact pattern -- if you accept it as true -- provide a basis for you to reconsider your assertion that there's no basis here for substantial contribution?

MS. GOLDEN: No, Your Honor.

THE COURT: And why is that?

MS. GOLDEN: Because they hired their individual attorneys to advance their own interests and the indirect benefits have not been put forth by the applicants and the U.S. trustee has had no position or time to evaluate any of that. The declarations that would put -- excuse me -- that were put before the Court do not make any of those representations.

I think the declarations before the Court are fairly straightforward and that the committee members did

the arduous work in this case as committee members and there is no evidence to the contrary.

THE COURT: Okay.

MS. GOLDEN: Your Honor, the U.S. Trustee believes that to approve these applications under 1129(a)(4) would effectively eviscerate the concept of substantial contribution embodied in Section 503(b) and would rewrite the Code to provide for reimbursement of professional fees incurred for any and all members of any creditors committee as a matter of course.

This is not what the Code intends or provides and it is expressly and specifically prohibited and the application should be denied.

Do you have anything further, sir?

THE COURT: No.

MS. GOLDEN: Thank you.

THE COURT: Thank you.

MR. DUNNE: Your Honor, I'll be brief. I only have three points to address.

The first one relates to the hypothetical that Your Honor was just teasing out. I think that the U.S. Trustee's office misunderstands the need for separate and independent representation of the individual committee members.

They did not hire counsel to advance their own

interests. And I -- I want to take a step back. I think everybody will recall at the beginning of the case there were numerous requests for multiple committees here. There were requests for committees at LCPI, LBSF, the U.S. Trustee's office denied those requests. We agreed with the U.S. Trustee's office. But they denied it for a number of reasons.

One of which is that they believed and correctly, I submit, that this committee contained enough creditors with different claims at different levels such that the adequate representation standards were met.

They also did it on the assumption that this committee would do the work of multiple committees. And it is precisely in that context that the need for their counsel arose. It's not the only reason for the counsel, but it arose for that.

Their counsel assisted them in discharging their duties to all the estates. We represented 23 different debtor entities. And it fostered the kind of push and pull of the plan negotiations that were done within the confines of the committee conference calls and meetings and it was very different. It didn't get a public airing because there weren't multiple committees. If there were multiple committees, I submit the costs of administration of this estate would have been substantially higher.

It also allowed -- because we needed to do this come plan time -- different creditors to look at different issues through different prisms. Somebody could put on an LCPI hat, somebody could put on an LBSF hat and see if that made sense. And they did that after we had already weighed in. Their advisors had already weighed in on what we thought was kind of middle of the fairway.

And then there was a debate in the hashing out of what -- when we -- this actually seized the light of day. I like Your Honor's phrase, beta testing. Do we think that the creditors will actually gravitate towards what we're doing here and what were the arguments each way. And they did that through in large part, their own counsel.

Second point, I don't believe that Section 503(b) is the sole basis for the payment of these fees. I believe Your Honor could rule that Section 1129(a)(4) authorizes the payment, but clearly we made the argument in the papers, as did Judge Gerber in Adelphia, that Section 1123(b)(6) also provides authority. It authorizes the debtor to include appropriate provisions in a plan. And the debtor is the gatekeeper for including such a provision.

They make the determination for whether or not to allow the payment of the fees of individual committee members counsel. And their decision in turn is then subject to creditors assent and ratification pursuant to the

confirmation process.

THE COURT: Well, let me ask you then, because you cited to a particular code section, but I was talking during argument for Ms. Golden, more broadly about the ability to craft a plan that would provide for these payments. And we had some debate as to the justification for payments under -- I said 1129(a)(4) because that's the confirmation standard that I look to. I don't craft plans. I just deal with the plans that are presented.

But the question is, is it your position as committee counsel that had a role in dealing with this plan that the plan provisions that provided for payment to your committee members under 6.7 were permissible and if so, how were they permissible?

MR. DUNNE: Yes, they were permissible and the how is because Section 1123(b) of the Bankruptcy Code is -- authorizes various -- or empowers the debtors to include various provisions in the plan. It doesn't mandate it. The required sections are in 1123(a). 1123(b) authorizes the debtors to include various things. 1123(b)(6) says any other appropriate provision that is not inconsistent with any provision of this title.

And then 1129(a)(4) says if one of those provisions that they include -- is my argument under 1123(b)(6) in the plan -- call for the payment by the debtor

to somebody in connection with the plan or incidental to the plan. That payment has to be approved or subject to approval by Your Honor as reasonable.

THE COURT: Well the U.S. Trustee says that those payments are here prohibited by virtue of the provisions of Section 503(b).

MR. DUNNE: Let me address that, because that was actually my third point. I'll do it -- I think prohibited is the wrong verb, not just too strong, it's just inaccurate.

If you look at Section 503(b)(3)(f) it is actually an enabling section. It says, you may pay attorneys fees for the following parties. And it does not include an official committee member's counsel. So there's nothing that says or any congressional intent that thou shalt not pay the fees of counsel to individual committee members.

What you have is that 503(b) fails to authorize the payment, which I submit is a huge difference than congressional intent to not pay it. It doesn't say that there's no authority elsewhere in the code. At best -- and this is only at best -- you would argue that there's a lack of authority to pay these fees in the non-consensual, non-plan context.

That's what 503(b)(3)(f) does in my view and cannot therefore rise to the level of something that's

prohibited under Section 1123(b)(6) as an appropriate provision, but it's inconsistent with any other provision in the plan.

The fact that it's failed to be authorized elsewhere all of a sudden it's an inconsistency, it's illogical to me, Your Honor. And so that is our argument as to why the payment of these fees are appropriate.

And with that, Your Honor, I'll yield.

THE COURT: Okay. Now, we've had a robust argument. Is there anyone who wishes to weigh in on this issue of applicable law governing the applications?

(Pause)

THE COURT: All right. The argument is closed then.

The issue remains what role is being played by those individuals who are here in the gallery on behalf of applicants and what if anything is left over that they may wish to present.

Is that something that we should proceed with now or are we going to simply bifurcate this and in effect have a determination of statutory entitlement to then be followed by issues that relate to the individual applications assuming I find a basis for statutory entitlement?

Has any consideration been given to order of play at this point?

MR. DUNNE: Your Honor, I clearly believe that the legal issue is not just the threshold issue. I think it's almost the whole issue. I don't believe there's much that -- I think everything is going to fall from that with the evidence that's in from the debtors' et cetera on reasonableness.

I don't think there's much to argue about reasonableness. So I think if we have a ruling, I'm hoping we can proceed to an order shortly thereafter on reasonableness to authorize the payment because I don't see reasonableness as a separate contested matter.

THE COURT: Well, I do have a question about entitlement to what amounts to attributed overhead to in house counsel and I'm quite concerned about that.

MR. DUNNE: Your Honor, may I address that?

THE COURT: Sure.

MR. DUNNE: Because this is a good report. That I because is the MetLife application where they are being compensated for their in-house lawyer's time. They advised us that they'll withdraw that application completely.

(Pause)

MR. DUNNE: Ms. Golden says it's also (indiscernible - 1:31:43). I thought those were indentured trustee issues which are separate, because they're separate authority for the indentured trustees.

THE COURT: Well, okay. Let's defer --

MR. DUNNE: Okay.

THE COURT: -- on the question of compensation attributable to the work of in house professionals as opposed to retained professionals. And if those -- if those items are going to fall away, that's actually a big plus.

Ms. Golden?

MS. GOLDEN: Okay. Thank you. Well, Your Honor, good news, this is something that Mr. Dunne and I do agree on that this really is the threshold issue, the kit and caboodle. And the U.S. Trustee at least requests that it be bifurcated and that the decision on the statutory standard be rendered.

Just for the record, the U.S. Trustee's original objection to the applications, the U.S. Trustee also did the reasonableness review and would stand on her objections that were in that objection that was filed in February of this year.

THE COURT: Okay. Now, I have a question about any role to be played by the fee committee at this juncture. A while ago the fee committee submitted some papers in the nature of a limited objection indicating that the fee committee had played a constructive role in reviewing all professional applications and saw no reason to distinguish these applications from the others that have been

considered.

I know that we had a chambers conference that addressed this issue ten months ago and there's no record of what was said during that conference that I have anyway.

To what extent is there an understanding between the parties as to the role, if any, to be played by the fee committee on reasonableness in the event that the Court were to determine that these fees should be allowed under one statutory standard or another?

MR. DUNNE: I -- my recollection of that chambers conference and I thought there was agreement that the fee committee was not to get involved and the reason for that was basically you had various members of the fee committee, the debtors have already done an exhaustive review of the applications themselves.

THE COURT: And I have Mr. Sukos's (ph) affidavit or declaration on that point.

MR. DUNNE: And the U.S. Trustee also a member of the fee committee is here pressing a number of objections to the applications. The committee has frankly lived through it and, you know, obviously believes that the work that they did was reasonable and justified. But for those reasons, we didn't think the fee committee added anything when all of its members aren't directly involved in this one way or another.

MS. GOLDEN: Your Honor, the U.S. Trustee agrees with what Mr. Dunne said. Also, one of the applicants is -- actually sits on the fee committee and it was the understanding generally of the fee committee that the U.S. Trustee would take the lead role in reviewing the general applications of the applicants and the U.S. Trustee has already done the reasonableness review as has debtors counsel and depending on Your Honor's ruling, there's really no reason why -- should Your Honor grant the applications -- that the U.S. Trustee couldn't do the normal job that her office does in terms of speaking with the various applicants and the committee.

THE COURT: Okay.

MS. STADLER: Excuse me. Judge can you hear me?

THE COURT: I think you're going to have to speak up a little louder. Are you calling from Wisconsin.

MS. STADLER: Can you hear me? This is Katherine Stadler from (indiscernible - 1:36:01).

THE COURT: We can hear you now.

MS. STADLER: Okay. Thank you. Judge, I just wanted to pipe in as counsel for the fee committee. I've been listening with interest all along and share my recollection of the results of that status conference which was that neither or the unsecured creditors committee nor the U.S. Trustee's office to use their role for the fee

committee in the review of the applications you're dealing with today. And the committee agreed to stand down based on that understanding.

But I would note that I am here today listening on behalf of the fee committee and speaking perhaps for the chair of the fee committee remains willing and able to step in and play a role if the Court should so desire.

THE COURT: That's fine. Thank you for that comment.

Does anyone else wish to be heard at this moment?

I think -- oh, Mr. Hiersteiner.

MR. HIERSTEINER: Excuse me, Your Honor. Thank you, Your Honor. Richard Hiersteiner --

THE COURT: You're going to have to walk up a little bit farther than that seat so you can be heard.

(Pause)

MR. HIERSTEINER: On other item, Your Honor, the application of U.S. Bank as a committee member and as a member of the -- as an indentured trustee was objected to by another party, Mr. Kuntz (ph) who filed what he called a refocused objection to the payment of fees of U.S. Bank and its counsel.

We have replied. Mr. Kuntz is not here. He submitted an email to me this morning suggesting that he had reviewed the agenda for today, didn't see these matters on

and therefore he was not attending. I responded immediately to tell him that the matters were on and we were appearing in support of the allowance of the fees and expenses of the trustee.

So I would ask that his objection to our fees be dispensed with at this time. Thank you.

THE COURT: Well, one of the problems with what you've just told me is that you've had direct contact with Mr. Kuntz who took the position that it wasn't on. And you're taking the position that it is on. And whether it's on or not, I haven't reviewed it.

The only matter that I have assumed was no for purposes of today's afternoon argument was the matter that we've just heard. And while I know it would be desirable to dispense with this remaining objection to your application, I don't feel that I can do that in absence of either Mr. Kuntz's consent to withdraw his objection or an actual hearing on the merits of his objection.

So we'll simply carry it to another day. That doesn't make you happy I can tell from your expression. I'm seeing a pained expression.

MR. HIERSTEINER: We had -- we had filed a reply to Mr. Kuntz's objection which advised him that the subject of the fee applications of committee members and indentured trustees including U.S. Bank was scheduled for today at 2

o'clock. He did not appear and did not press his objection.

THE COURT: What I'm telling you is that as the person who prepared for today's argument, I paid no attention to Mr. Kuntz's objection and I can't in good conscious --

MR. HIERSTEINER: Okay.

THE COURT: -- default him --

MR. HIERSTEINER: I understand.

THE COURT: -- because from my perspective it wasn't on. It may have been on from your perspective, but from my perspective the only thing I was dealing with was what we've just dealt with.

MR. HIERSTEINER: Thank you, Your Honor.

THE COURT: So we'll deal with it another day one way or the other. And so that it's clear that nobody is losing any position with respect to this, I'm not deciding this from the bench today anyway. I'm taking this under advisement. And I'll advise the parties involved as to when to expect a ruling so that you don't lose any sleep, it will not be before the Christmas holidays.

MR. HIERSTEINER: Thank you, Your Honor. May I ask one other question while I'm here? I was a little confused about the resolution of the issue of adjudication of reasonableness of the fees and expenses of the committee members. On the one hand, I heard that that was no longer

an issue once the determination, assuming it was made in one direction, had been made by Your Honor. On the other hand, I heard that those were to be bifurcated and there would be a separate issue --

THE COURT: Here's what I believe is the disposition, but just because I believe it doesn't mean that's what everybody else believes.

I believe that I'm going to make a determination in due course as to whether the individual committee members have an entitlement to be paid something under one statutory authority or another based upon the legal issues that we've debated this afternoon.

On the question of reasonableness, I have myself identified some concerns. Those concerns have lead to the withdrawal of one aspect of one application and perhaps -- although it hasn't been confirmed, the withdrawal of another aspect of another application relating to time associated with in house lawyers and some assumed billing rate that applies to them, something that I've -- find a curiosity.

I have not yet made any independent determination with respect to reasonableness. I have heard arguments that because the debtor has concluded in the debtor's judgment that this is reasonable, that that should be the end of the analysis.

I have heard or read from the U.S. Trustee that

the debtors' view is not the last word and there are any number of particular objections set forth in the U.S. Trustee's papers.

When we get to phase 2, here's what I'm assuming will take place. If I rule that there is no entitlement to compensation, phase 2 is a very brief period in which nothing happens other than anguish on the part of the applicants and perhaps an appeal.

If I find that there is a statutory basis for these applications to be allowed, I am assuming that there will be a dialogue that then takes place in which parties will confirm the amounts that are deemed reasonable either by virtue of an agreement of our one objector, the U.S. Trustee as to reasonableness. And absence such an agreement, I assume that there will be an opportunity for a hearing on proper notice.

Does what I have just said sound right to the parties?

UNIDENTIFIED SPEAKER: Yes, sir.

MS. GOLDEN: Yes, Your Honor.

UNIDENTIFIED SPEAKER: Fine. Thank you, Your Honor.

THE COURT: Then that's how we're going to leave it. Have a good holiday everybody.

(Chorus of thank you)

(Proceeding concluded at 4:02 p.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Nicole Yawn and Melissa Looney certify that the foregoing transcript is a true and accurate record of the proceedings.

Nicole Yawn

Digitally signed by Nicole Yawn
DN: cn=Nicole Yawn, o, ou, email=digital1@veritext.com, c=US
Date: 2012.12.21 15:49:48 -05'00'

Melissa Looney

Digitally signed by Melissa Looney
DN: cn=Melissa Looney, o, ou, email=digital1@veritext.com, c=US
Date: 2012.12.21 15:50:15 -05'00'

Veritext
200 Old Country Road
Suite 580
Mineola, NY 11501

Date: December 21, 2012